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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
STEPHEN T. GAGE, individually and as
trustee, and UNION TRUST COMPANY,
individually and as trustee,

Defendants and Appellants.

vs.

THE UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United
States for the District of Oregon from the Decree
entered December 9, 1915.

Filed

MAR 3 - 1916

F. D. Monckton,

Clerk.

No. _____

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SOUTHERN PACIFIC COMPANY,
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INDEX

	PAGE
Appeal, Bond on.....	71
Appeal, Citation on.....	1
Appeal, Order as to transcript of record on.....	84
Appeal, Praecipe for transcript of record on.....	100
Appeal, Petition for.....	21
Appeal, Stipulation as to record on.....	79
Assignment of Errors, Oregon & California R. R. Co.	28
Assignment of Errors, Southern Pacific Co.....	39
Assignment of Errors, Stephen T. Gage.....	49
Assignment of Errors, Union Trust Company.....	60
Bond on appeal.....	71
Certificate to transcript on appeal.....	160
Citation on appeal.....	1
Cost Bill	12
Cost Bill, Objections to.....	15
Costs, Order taxing.....	17
Decree on mandate of United States Supreme Court	8
Decree on mandate of United States Supreme Court, Record on hearing on form of.....	4
Execution of decree, Order staying.....	16
Gage, Stephen T., Assignment of errors by.....	49
Gage, Stephen T., Petition of, for appeal.....	21
Mandate, United States Supreme Court	5

INDEX—Continued

	PAGE
Mandate, United States Supreme Court, Decree on .	8
Mandate, United States Supreme Court, Order to file	4
Mandate, United States Supreme Court, Record of hearing on form of decree on.....	4
Objections to cost bill.....	15
Opinion, United States Supreme Court.....	105
Order extending time to file statement of evidence	14, 19, 77
Order extending time to file transcript of record on appeal	103
Order to file mandate of United States Supreme Court	4
Order settling statement of case.....	98
Order staying execution of decree.....	16
Order taxing costs.....	17
Order as to transcript of record of appeal.....	84
Oregon & California Railroad Company, Assign- ment of errors by.....	28
Oregon & California Railroad Company, Petition of, for appeal	21
Petition for appeal.....	21
Praeceptum for transcript of record on appeal.....	100
Record of hearing on form of decree on mandate of United States Supreme Court.....	4
Record on appeal, Stipulation as to.....	79
Record on appeal, Order as to.....	84

INDEX—Continued

PAGE

Record on appeal, Praecept for transcript of	100
Southern Pacific Company, Assignment of errors by	39
Southern Pacific Company, Petition of, for appeal.	21
Statement of the case	86
Statement of the case, Order settling	98
Statement of evidence, Order extending time to file	14, 19, 77
Stipulation as to record on appeal	79
Supreme Court of the United States, Mandate of . .	5
Supreme Court of the United States, Opinion of . .	105
Supreme Court of the United States, Decree on mandate of	8
Supreme Court of the United States, Order to file mandate of	4
Time to file statement of evidence, Order extending	14, 19, 77
Time to file transcript of record on appeal, Order extending	103
Transcript of record on appeal, Certificate to	160
Transcript of record on appeal, Order as to	84
Transcript of record on appeal, Order extending time to file	103
Transcript of record on appeal, Praecept for	100
Transcript of record on appeal, Stipulation as to . . .	79
Union Trust Company, Assignment of errors by . . .	60
Union Trust Company, Petition of, for appeal	21

INDEX—Continued

	PAGE
United States Supreme Court, Decree on mandate of	8
United States Supreme Court, Mandate of	5
United States Supreme Court, Opinion of	105
United States Supreme Court, Order to file man- date of	4

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

OREGON AND CALIFORNIA RAILROAD COM-
PANY, SOUTHERN PACIFIC COMPANY,
STEPHEN T. GAGE, individually and as
trustee, and UNION TRUST COMPANY,
individually and as trustee,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

NAMES AND ADDRESSES OF SOLICITORS
UPON THIS APPEAL:

Wm. F. Herrin,

P. F. Dunne,

San Francisco, California.

Wm. D. Fenton,

Portland, Oregon.

For Appellants Oregon and California Rail-
road Company; Southern Pacific Company
and Stephen T. Gage.

Dolph, Mallory, Simon & Gearin, John M. Gearin,

Portland, Oregon,

Miller, King, Lane & Trafford, and John C. Spooner,
New York.

For Appellant Union Trust Company.

Thomas W. Gregory, Attorney-General,

John W. Davis, Solicitor-General,

Constantine J. Smyth, Special Assistant to the Attor-
ney-General,

Clarence L. Reames, United States District Attorney
for Oregon.

For Appellee.

*In the District Court of the United States for the
District of Oregon, Ninth Circuit.*

No. 3340.

IN EQUITY.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

OREGON AND CALIFORNIA RAILROAD COM-
PANY, SOUTHERN PACIFIC COMPANY,
STEPHEN T. GAGE, individually and as
trustee, and UNION TRUST COMPANY,
individually and as trustee,

Defendants.

United States of America, ss.

To United States of America,

To T. W. Gregory, Attorney General of the United
States,

To Constantine J. Smyth, Special Assistant to the At-
torney General of the United States, and

To Clarence L. Reames, United States Attorney for
the District of Oregon.

GREETING

WHEREAS, Oregon and California Railroad Com-
pany, Southern Pacific Company, Stephen T. Gage,
individually and as trustee, and Union Trust Company
of New York, individually and as trustee, the defend-
ants in the above-entitled suit, have appealed to the

United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and decree made and rendered in the above-entitled Court in the above cause, No. 3340 in Equity, and entered therein on the ninth day of December, A. D., One Thousand Nine Hundred and Fifteen, and from each and every part of said judgment and decree, and the said appeal has been allowed and the security required by law has been given;

You are, therefore, hereby, cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from and after the date of this citation, to show cause, if any there be, why said judgment and decree appealed from should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles E. Wolverton, Judge of the United States District Court for the District of Oregon, with the seal of said Court hereunto affixed, this 8th day of January, A. D. 1916.

CHAS. E. WOLVERTON,
United States District Judge.

(SEAL)

Attest:

G. H. Marsh,

Clerk United States District Court, District of
Oregon.

District of Oregon.

County of Multnomah—ss.

Due service of the foregoing citation is hereby ac-

cepted in Multnomah County, Oregon, this 8th day of January, 1916.

JOHN W. DAVIS,
Solicitor-General of the United States.

C. J. SMYTH,
Special Assistant to the Attorney-General.
Attorneys for Complainant.

CLARENCE L. REAMES,
United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

4 *Oregon and California Railroad Company*

*In the District Court of the United States for the
District of Oregon.*

NOVEMBER TERM, 1915.

BE IT REMEMBERED, That on Wednesday, the 8th day of December, 1915, the same being the 33rd judicial day of the regular November, 1915, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had to-wit:

ORDER TO FILE MANDATE. RECORD OF
HEARING ON FORM OF DECREE ON
MANDATE.

*In the District Court of the United States for the
District of Oregon.*

No. 3340. December 8, 1915.

UNITED STATES OF AMERICA,

v.

OREGON AND CALIFORNIA RAILROAD
COMPANY, et al.

Now, at this day, come the plaintiff by Mr. Constantine J. Smyth, Special Assistant to the Attorney-General, and Mr. Clarence L. Reames, United States Attorney, and the defendant Oregon and California Railroad Company by Mr. Peter F. Dunne and Mr. William D. Fenton, of counsel, and Union Trust Company by Mr. John M. Gearin, of counsel, and the intervenors and cross-complainants by Mr. A. W. Lafferty and Mr.

L. C. Garrigus, of counsel; whereupon said plaintiff presents to the Court the mandate of the Supreme Court of the United States in this cause and moves the Court for an order to file said mandate, whereupon IT IS ORDERED that said mandate be filed.

And thereupon this cause comes on to be heard upon the form of decree to be entered herein upon said mandate in accordance with the directions of said mandate and the Court having heard the arguments of counsel will advise thereof.

And afterwards, to wit, on the 8th day of December, 1915, there was duly filed in said Court and cause a Mandate of the Supreme Court of the United States, in words and figures as follows, to wit:

**MANDATE OF UNITED STATES SUPREME
COURT.**

United States of America,—ss.

The President of the United States of America,

To the Honorable the Judges of the District Court of
the United States for the District of Oregon,

(Seal, United States Supreme Court)

Greeting:

WHEREAS, lately in the District Court of the United States, for the District of Oregon, before you, or some of you, in a cause between The United States of America, complainant, and Oregon & California Railroad Company, Southern Pacific Company, Stephen T.

Gage, individually and as trustee, Union Trust Company, individually and as trustee, John L. Snyder, et al., defendants; John L. Snyder, Julius F. Prah, Albert E. Thompson, et al., complainants, and Oregon & California Railroad Company, Union Trust Company, and S. T. Gage, defendants, in cross-complaint, and William F. Slaughter, et al., intervenors, in Equity, No. 3340, wherein the decree of the said District Court entered in said cause on the 1st day of July, A. D. 1913, is in the following words, viz.—

(Here follows copy of said decree of said District Court, as the same is contained in Volume III, pages 1296-1550 of printed transcript of the record on the former appeals taken in this case from said decree of July 1, 1913, and which said transcript of the record is on file in the clerk's office of the Circuit Court of Appeals for the Ninth Circuit, the case being numbered therein 2400, and in the clerk's office of the Supreme Court of the United States, the case in the latter court being numbered 679, October Term, 1914.)

as by the inspection of the transcript of record of the United States Circuit Court of Appeals for the Ninth Circuit, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari agreeably to the act of Congress in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and fourteen, the said cause came on to be heard before the said SUPREME COURT, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court that the decree of the District Court of the United States for the District of Oregon in this cause be, and the same is hereby, reversed.

AND IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

June 21, 1915.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 7th day of August in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

Received August 11, 1915. And thereafter from time to time by stipulation of counsel the date when the said mandate would be filed and a decree of the court entered thereon was postponed, and it was further stipulated by counsel that the said proceedings would come on for hearing on the 8th day of December, 1915. Filed December 8, 1915.

G. H. MARSH,

Clerk United States District Court, District of Oregon.

And afterwards, to wit, on Thursday, the 9th day of December, 1915, the same being the 34th judicial day of the regular November, 1915, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

DECREE ON MANDATE OF UNITED
STATES SUPREME COURT.

*In the District Court of the United States for the
District of Oregon.*

No. 3340.

DECREE.

The United States of America,
Complainant,

vs.

Oregon & California Railroad Company,
et al,

Defendants,

John L. Snyder, et al,

Defendants and Cross-Complainants,

William F. Slaughter, et al,

Interveners.

In pursuance of the mandate of the Supreme Court of the United States filed in this court on the 8th day of December, 1915, in the above entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called "the defendants," be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the "cross-complainants," and the interveners.

2. That the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making

or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing, or authorizing the cutting or removal of the timber thereon or any part thereof; from removing or authorizing the removal of mineral or other deposits therein; and from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to await the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral, or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendants all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to mod-

ify this decree in that regard if, in its opinion, good cause shall then exist for doing so.

5. That this decree shall apply not only to all said grant lands unsold at the time this action was instituted, but also to all such grant lands sold prior to the institution of the action which have since reverted or shall hereafter revert to the defendants or any one of them.

6. That this decree shall be without prejudice to any other suits, rights or remedies which the government may have by law or under the Joint Resolution of Congress passed April 30, 1908, or under the Act of Congress passed August 20, 1912, against the defendants or any of them.

7. That the complainant have and recover from the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, its lawful costs and disbursements herein, taxed at \$6,249.02, and that execution issue therefor.

Done in open court this 9th day of December, 1915.

BY THE COURT.

Chas. E. Wolverton, Judge.

Filed December 9, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 16th day of December, 1915, there was duly filed in said court and cause, a Cost Bill, in words and figures as follows, to wit:

COST BILL.

Statement of disbursements claimed by the complainant in the above entitled cause, against the defendants Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, and Union Trust Company, viz:

Clerk's fees	\$ 383.75
Marshal's fees	269.47
Attorney's fees	40.00
Depositions of 70 witnesses before special examiner	350.00
Examiner's fees	1,942.50
Witness fees (as appears from the records of the marshal's office and the clerk's office showing payment)	3,263.30
<hr/>	
Total taxed at.....	\$6,249.02
Taxed by order of January 3, 1916.	

G. H. Marsh, Clerk.

United States of America
District of Oregon—ss.

I, Clarence L. Reames, being duly sworn, on my oath say that I am the United States Attorney for the District of Oregon and one of the attorneys for the complainant in the above entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit; and that the said complainant is entitled to recover the same from the defendants Oregon & California Railroad Company,

Southern Pacific Company, Stephen T. Gage and Union Trust Company, as I verily believe.

CLARENCE L. REAMES.

Subscribed and sworn to before me this 16th day of December, 1915.

G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

United States of America,

State and District of Oregon—ss.

Due service of the within and foregoing statement of costs and disbursements is hereby admitted at Portland, Oregon, this, the 16th day of December, 1915.

WM. D. FENTON,

of Attorneys for the defendants Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage.

DOLPH, MALLORY, SIMON & GEARIN,

Attorney for the defendant Union Trust Company.

Filed December 16, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Friday, the 17th day of December, 1915, the same being the 41st judicial day of the regular November, 1915, term of said court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

**ORDER EXTENDING TIME TO FILE
STATEMENT OF THE EVIDENCE.**

Now on this 17th day of December, 1915, upon motion of counsel for Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, defendants above named, for an order of this court extending and enlarging the time for the said defendants and each of them to prepare, serve and file in the office of the clerk of the above entitled court, their and each of their proposed statement of the evidence, or proposed bill of exceptions, statement of, or other record as the said parties may deem advisable, complainant appearing by Clarence L. Reames, United States District Attorney, and the said defendants appearing by Wm. D. Fenton and John M. Gearin; and

It appearing to the court that good cause is shown and exists for said order, and that the said defendants are entitled thereto,

IT IS ORDERED that the time for the said defendants and each of them in the above entitled cause, to prepare, serve and file in said court their and each of their said proposed statement of evidence, or bill of exceptions, or other statement, or record as they may be advised, be and the same is hereby extended and enlarged to and inclusive of January 15, 1916.

CHAS. E. WOLVERTON,

District Judge.

Filed December 17, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 18th day of December, 1915, there was duly filed in said court and cause, objections to cost bill, in words and figures as follows, to wit:

OBJECTIONS TO COST BILL.

Come now the defendants above named, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage and Union Trust Company, and object to so much of the cost bill served and filed herein by the complainant wherein complainant claims \$350.00 for depositions of seventy witnesses before Special Examiner, and moves to strike out said item upon the ground that the same is not a taxable cost or disbursement allowed by law; and on the further ground that all of the testimony taken in said cause was taken and reduced to writing by Miss M. A. Fleming, Special Examiner, and no depositions were taken in said cause; and on the further ground that complainant has charged at the rate of \$5.00 for the alleged depositions of each witness, when, if the same is taxable as a deposition, the legal charge is \$2.50 for each witness.

WM. D. FENTON, P. F. DUNNE, WM. F.
HERRIN AND JNO. M. GEARIN,

Attorneys for said Defendants.

State and District of Oregon—ss.

I, Wm. D. Fenton, being first duly sworn, depose and say that I am Secretary of the Oregon & California Railroad Company, one of the defendants herein, and I am one of the attorneys of the said defendants; that the

objections made and taken above are true as I verily believe.

WM. D. FENTON,

Subscribed and sworn to before me this 18th day of December, 1915.

ALFRED A. HAMPSON,
Notary Public for Oregon.

(SEAL)

My commission expires June 6, 1916.

State of Oregon,

County of Multnomah—ss.

Due service of the within objections is hereby accepted in said County, this 18th day of December, 1915, by receiving a copy thereof, duly certified to as such by Wm. D. Fenton, of attorneys for defendants.

CLARENCE L. REAMES,

U. S. Attorney and Attorney for Complainant.

Filed December 18, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 27th day of December, 1915, the same being the 49th judicial day of the regular November, 1915, term of said court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER STAYING EXECUTION OF
DECREE.

Come now the defendants above named, Oregon & California Railroad Company, Southern Pacific Com-

pany, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and move the court for a stay of the decree of December 9, 1915, heretofore rendered and entered herein for a period of sixty (60) days from that date, complainant appearing by Clarence L. Reames, United States Attorney, the defendants appearing by Wm. D. Fenton and John M. Gearin,

Whereupon the court being fully advised,

IT IS ORDERED that the execution of said decree be and the same is hereby stayed to and including February 7, 1916, as to costs and disbursements.

CHAS. E. WOLVERTON, Judge.

Filed December 27, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 3rd day of January, 1916, the same being the 55th judicial day of the regular November, 1915, term of said court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER TAXING COSTS.

Heretofore and on the 16th day of December, 1915, the complainant, the United States of America, filed herein its duly verified cost bill claiming costs against the defendants Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, indi-

vidually and as trustee, in the sum of \$6,249.02 and thereafter and on the 18th day of December, 1915, the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and the Union Trust Company, individually and as trustee, filed herein their duly verified objections to said cost bill, by which said objections the said defendants objected to the allowance of \$350.00 for the depositions of seventy witnesses:

Thereafter, and on the 27th day of December, 1915, the matter came on regularly to be heard, the objecting defendants being present and represented by William D. Fenton and John M. Gearin of their attorneys, and the complainant being represented by Clarence L. Reames, United States Attorney for the District of Oregon, and the court having sat and heard the statements and arguments of counsel and having taken the matter under advisement to be passed upon at a later date,

Now, the Court being fully advised in the premises, it is ordered and adjudged that said objections be and the same hereby are overruled and the clerk is directed to tax as costs and disbursements against the said defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and the Union Trust Company, individually and as trustee, the following items, to wit:

Clerk's fees	\$ 383.75
Marshal's fees	269.47
Attorney's fees	40.00
Depositions of 70 witnesses before special examiner	350.00
Examiner's fees	1,942.50
Witness fees (as appears from the records of the marshal's office and the clerk's office showing payment)	3,263.30
<hr/>	
Total taxed at	\$6,249.02

Done in open court this the 3rd day of January,
1916.

CHAS. E. WOLVERTON, Judge.

Filed January 3, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Saturday, the 8th day of January, 1916, the same being the 60th judicial day of the regular November, 1915, term of said court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER EXTENDING TIME TO FILE STATEMENT OF THE EVIDENCE.

Now on this 8th day of January, 1916, upon motion of counsel for Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, defendants above named, for an or-

der of this Court extending and enlarging the time of the said defendants, and each of them, to prepare, serve and file their, and each of their, proposed Statement of the Evidence, or proposed Bill of Exceptions, Statement, or other record as the said parties may deem advisable, complainant appearing by Clarence L. Reames, United States District Attorney, and the said defendants appearing by Wm. D. Fenton and John M. Gearin; and it appearing to the Court that good cause is shown and exists for said order, and that the said defendants are entitled thereto,

IT IS ORDERED that the time for the said defendants, and each of them, in the above entitled cause, to prepare, serve and file in said Court, their and each of their said proposed Statement of Evidence, or Bill of Exceptions, Statement, or other record as they may be advised, be and the same is hereby extended and enlarged to and inclusive of January 25, 1916.

CHAS. E. WOLVERTON,
District Judge.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was issued out of said court a Petition for Appeal, in words and figures, as follows, to wit:

PETITION FOR APPEAL.

*In the District Court of the United States, for the
District of Oregon, Ninth Circuit.*

NO. 3340 IN EQUITY.

United States of America,

Complainant,

vs.

Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee,

Defendants.

Oregon & California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, and Union Trust Company of New York, individually and as trustee, defendants in the above-entitled cause, and each and all of said defendants, conceiving themselves aggrieved by the judgment and decree made and rendered by the above-entitled Court in the above cause, No. 3340 in Equity, and entered therein on the ninth day of December, A. D. one thousand nine hundred and fifteen, in alleged pursuance of the mandate of the Supreme Court of the United States, filed in said Court in said cause on the eighth day of December, A. D. one thousand nine hundred and fifteen, of which said judgment and decree the following is a copy, viz.:

22 *Oregon and California Railroad Company*

*“In the District Court of the United States, for the
District of Oregon.*

United States of America,

Complainant,

vs.

Oregon & California Railroad Company, et al.,

Defendants.

John L. Snyder, et al,

Defendants and Cross-Complainants.

William F. Slaughter, et al.,

Interveners.

DECREE.

“In pursuance of the mandate of the Supreme Court of the United States filed in this Court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called ‘the defendants,’ be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross complainants, hereinafter called the ‘cross complainants,’ and the interveners.

2. That the defendants and their respective officers and agents be, and each is hereby, enjoined from selling

the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing or authorizing the cutting or removal of the timber thereon or any part thereof; from removing or authorizing the removal of mineral or other deposits therein; and from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or

otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk or court, or other institution or person, to wait the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendants all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the Court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so.

5. That this decree shall apply not only to all said grant lands unsold at the time this action was instituted, but also to all such grant lands sold prior to the institution of the action which have since reverted or shall hereafter revert to the defendants or any one of them.

6. That this decree shall be without prejudice to any other suits, rights or remedies which the government may have by law or under the Joint Resolution of Congress

passed April 30, 1908, or under the Act of Congress passed August 20, 1912, against the defendants or any of them.

7. That the complainant have and recover from the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, its lawful costs and disbursements herein, taxed at \$————, and that execution issue therefor.

Done in open court this 9th day of December, 1915.

BY THE COURT,

(Signed) CHARLES E. WOLVERTON,

Judge.”

Do, and each of them does, hereby jointly and severally appeal from the said judgment and decree and from the whole, and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

And the said Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as Trustee, and Union Trust Company of New York, individually and as Trustee, the said defendants, and each and all of them, in the above-entitled cause, file herewith their and each of their assignment of errors asserted and intended to be urged upon this their said appeal.

And the said Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, in-

dividually and as Trustee, and Union Trust Company of New York, individually and as trustee, the said defendants, and each and all of them in the above entitled cause, pray that this their petition for said appeal, and that their said appeal may be allowed and that citation issue herein as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and decree was made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and also that an order be made fixing the amount of security which the said defendants shall give and furnish upon this their said appeal, in order to supersede, suspend and stay Paragraph 7 of said judgment and decree wherein it was adjudged and decreed that complainant have and recover from said four above-named defendants and each of them its lawful costs and disbursements herein and that execution issue therefor, and that upon the giving of such security said paragraph 7 of said judgment and decree, and every part of said paragraph and execution thereon, be superseded, suspended and stayed until the final determination of this cause on appeal.

And your petitioners will ever pray.

WM. F. HERRIN,
P. F. DUNNE and
WM. D. FENTON,

Solicitors and attorneys for said Defendants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee.

MILLER, KING, LANE & TRAFFORD,
DOLPH, MALLORY, SIMON & GEARIN,
JOHN C. SPOONER, JOHN M. GEARIN,

Solicitors and attorneys for said Defendant, Union
Trust Company of New York, individually and as
Trustee.

The foregoing petition for allowance of appeal is
granted and the said appeal is allowed as prayed, upon
the giving of a bond in the sum of FIFTEEN THOU-
SAND DOLLARS (\$15,000.00), to be approved by
this Court, which bond shall, from the date of its ap-
proval, operate as a supersedeas as to paragraph 7 of said
judgment and decree.

Dated this 8th day of January, 1916.

CHAS. E. WOLVERTON,
Judge of said District Court.

District of Oregon,
County of Multnomah,—ss.

Due service of the foregoing petition for appeal is
hereby admitted in Multnomah County, Oregon, this
8th day of January, 1916, by receiving a copy thereof
duly certified to.

JOHN W. DAVIS,
Solicitor General.

C. J. SMYTH,
Special Assistant to Attorney General,
Attorneys for Complainant.

CLARENCE L. REAMES,
United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said Court and cause, an Assignment of Errors, by defendant, Oregon and California Railroad Company, in words and figures as follows, to wit:

**DEFENDANT OREGON AND CALIFORNIA
RAILROAD COMPANY'S ASSIGNMENT
OF ERRORS.**

The defendant, Oregon and California Railroad Company, complains of errors in the proceedings in this case in the District Court of the United States for the District of Oregon, in the above cause, No. 3340 in Equity, and in the decision, judgment and decree rendered, made and entered therein on the 9th day of December, 1915, under and in alleged pursuance of the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915, and assigns the following as the errors complained of:

1. The Court erred in making and entering the said decree of December 9th, 1915.

2. The Court erred in not pursuing the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915.

3. The said decree of December 9th, 1915, is not in pursuance of the said mandate, and the Court accordingly erred in making and entering such decree.

4. The Court erred in making and entering the said decree of December 9th, 1915, and each and every paragraph thereof.

5. The Court erred in adjudging and decreeing, as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

6. The Court erred in adding to the term "actual settler," in said paragraph 2, the qualifying phrase "on the land sold to him."

7. The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also

from cutting or removing, or authorizing the cutting or removal of any timber thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land containing the mineral or other deposits.

8. The Court erred in its said decree in incorporating into and making part of the general injunction therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removing or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits.

9. The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

10. The Court erred in not holding and decreeing that the language of the grants herein and of the limita-

tions upon them is general, and that it was not competent to the said Court to attach exceptions thereto in its decree.

11. The Court erred in not holding and decreeing that the terms of the settlers' proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observance of such terms would consist in refraining from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

12. The Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.

13. The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

14. The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called settlers' proviso or clause in the Granting Act and Acts had application only as and when the railroad company made sales of the land.

15. The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not so holding and decreeing with reference to any mineral or other deposits in or products out of said lands—subject to such qualifications as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

16. The Court erred in not holding and decreeing that the language of the so-called settlers' clause or proviso in the Granting Act and Acts is not directive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products are concerned, or any or either of them, the grant of the said lands was unqualified.

17. The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such discretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled, as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut, and remove such timber, or to authorize the cutting or removal of the same,

and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of the soil thereof—subject to any qualifications arising out of the limited injunction referable to the six months' period above mentioned.

18. The Court erred in not holding and decreeing that the railroad company, so long as it occupied the status of an owner of unalienated lands within the limits of the grant and grants, had all the rights therein of a grantee in fee simple, including the rights of such grantee to the timber thereon or to the mineral or other deposits therein, or to the products of the soil thereof—subject to any qualification as aforesaid, arising out of said limited injunction.

19. The Court erred in not holding and decreeing that the provisions of the so-called settlers' proviso and clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any qualification as aforesaid arising out of said limited injunction.

20. The Court erred in not holding and decreeing that timber cut upon the granted lands, while the same remained unalienated in the railroad company, belonged to said railroad company; and likewise as to any minerals extracted therefrom, or any products of the soil culti-

vated thereon—subject to any qualification arising out of said limited injunction, referable to the aforesaid period of six months.

21. The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the so-called settlers' proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

22. The Court erred in making and entering a decree herein in modification and enlargement of the terms of the mandate from the Supreme Court of the United States.

23. The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein; and in adjudging and decreeing that execution issue against the said defendants, or any or either of them, for any costs or disbursements herein.

25. The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

26. The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called settlers' clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both below and on appeal; and in not holding and decreeing that inasmuch as the said defendants had prevailed in resisting such contention, it was not equitable to tax them, or either of them, with costs and disbursements herein in favor of the complainant.

27. The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each to bear the costs of his or its own side of the litigation.

28. The Court erred in not making and entering as and for its decree in this cause, and in place and stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by the said last-named

defendants and each and every of them—that is to say, in not making and entering as its decree in said cause, the following decree:

“In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the ‘defendants’ be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the ‘cross-complainants’ and ‘interveners.’

2. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from

any disposition of the said lands or any part thereof, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

WHEREFORE, this defendant, Oregon and California Railroad Company, prays that the aforesaid judgment and decree which was made, rendered and entered herein by the above-entitled Court in said cause No. 3340 in Equity, on the 9th day of December, 1915, and that each of said paragraphs of said judgment and decree be reversed, excepting paragraph 1 thereof, wherein it is provided:

"That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called 'the defendants,' be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross complainants, hereinafter called the 'cross complainants,' and the interveners,"

and particularly that paragraph 2 and that paragraph 7 of said judgment and decree be reversed, and for such other relief to this defendant, said Southern Pacific Company, said Stephen T. Gage, individually and as Trustee, and said Union Trust Company, individually and as Trustee, as may be proper.

WM. F. HERRIN,

P. F. DUNNE,

WM. D. FENTON,

Solicitors and Attorneys for said Oregon and California
Railroad Company.

Service of the foregoing Assignments of Errors admitted this 8th day of January, 1916.

JOHN W. DAVIS,

Solicitor General of the United States.

C. J. SMYTH,

Special Assistant to the Attorney General.

Solicitors and Attorneys for Appellee.

CLARENCE L. REAMES,

United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said Court and cause, an Assignment of Errors, by the defendant, the Southern Pacific Company, in words and figures as follows, to wit:

DEFENDANT SOUTHERN PACIFIC COMPANY'S ASSIGNMENT OF ERRORS.

The defendant, Southern Pacific Company, complains of errors in the proceedings in this case in the District Court of the United States for the District of Oregon, in the above cause, No. 3340 in Equity, and in the decision, judgment and decree rendered, made and entered therein on the 9th day of December, 1915, under and in alleged pursuance of the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915, and assigns the following as the errors complained of:

1. The Court erred in making and entering the said decree of December 9th, 1915.

2 The Court erred in not pursuing the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915.

3. The said decree of December 9th, 1915, is not in pursuance of the said mandate, and the Court accordingly erred in making and entering such decree.

4. The Court erred in making and entering the said decree of December 9th, 1915, and each and every paragraph thereof.

5. The Court erred in adjudging and decreeing, as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of

April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.”

6. The Court erred in adding to the term “actual settler,” in said paragraph 2, the qualifying phrase “on the land sold to him.”

7. The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also from cutting or removing, or authorizing the cutting or removal of any timber thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits

therein, except in connection with the sale of the land containing the mineral or other deposits.

8. The Court erred in its said decree in incorporating into and making part of the general injunction therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removing or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits.

9. The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

10. The Court erred in not holding and decreeing that the language of the grants herein and of the limitations upon them is general, and that it was not competent to the said Court to attach exceptions thereto in its decree.

11. The Court erred in not holding and decreeing that the terms of the settlers' proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observ-

ance of such terms would consist in refraining from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

12. The Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.

13. The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

14. The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called settlers' proviso or clause in the Granting Act and Acts had application only as and when the railroad company made sales of the land.

15. The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not

so holding and decreeing with reference to any mineral or other deposits in or products out of said land—subject to such qualification as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

16. The Court erred in not holding and decreeing that the language of the so-called settler's clause or proviso in the Granting Act and Acts is not directive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products are concerned, or any or either of them, the grant of the said lands was unqualified.

17. The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such discretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled, as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut, and remove such timber, or to authorize the cutting or removal of the same, and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of the soil thereof—subject to any qualification arising out of the limited injunction referable to the six months' period above mentioned.

18. The Court erred in not holding and decreeing that the railroad company, so long as it occupied the

status of an owner of unalienated lands within the limits of the grant and grants, had all the rights therein of a grantee in fee simple, including the rights of such grantee to the timber thereon or to the mineral or other deposits therein, or to the products of the soil thereof—subject to any qualification as aforesaid, arising out of said limited injunction.

19. The Court erred in not holding and decreeing that the provision of the so-called settlers' proviso and clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any qualification as aforesaid arising out of said limited injunction.

20. The Court erred in not holding and decreeing that timber cut upon the granted lands, while the same remained unalienated in the railroad company, belonged to said railroad company; and likewise as to any minerals extracted therefrom, or any products of the soil cultivated thereon—subject to any qualification arising out of said limited injunction, referable to the aforesaid period of six months.

21. The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the

so-called settlers' proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

22. The Court erred in making and entering a decree herein in modification and enlargement of the terms of the mandate from the Supreme Court of the United States.

23. The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein; and in adjudging and decreeing that execution issue against the said defendants, or any or either of them, for any costs or disbursements herein.

25. The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

26. The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called settlers' clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both below and on appeal; and in not holding and decreeing that inasmuch as the said defendants had prevailed in resisting such contention, it was not equitable to tax them, or either of them, with costs and disbursements herein in favor of the complainant.

27. The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each to bear the costs of his or its own side of the litigation.

28. The Court erred in not making and entering as and for its decree in this cause, and in place and stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by the said last-named defendants and each and every of them—that is to say, in not making and entering as its decree in said cause, the following decree:

“In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the 8th day of December, 1915, in the above-entitled cause, counsel

for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the 'defendants' be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the 'cross-complainants' and 'interveners.'

2. That said defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from any disposition of the said lands or any part thereof, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands in accordance with such policy as it may deem fitting under the

circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act.”

WHEREFORE, this defendant, Southern Pacific Company, prays that the aforesaid judgment and decree which was made, rendered and entered herein by the above-entitled Court in said cause No. 3340 in Equity, on the 9th day of December, 1915, and that each of said paragraphs of said judgment and decree be reversed, excepting paragraph 1 thereof, wherein it is provided:

“That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called ‘the defendants,’ be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross complainants, hereinafter called the ‘cross complainants,’ and the interveners,”

and particularly that paragraph 2 and that paragraph 7 of said judgment and decree be reversed, and for such other relief to this defendant, said Oregon and California Railroad Company, said Stephen T. Gage, individually

and as trustee, and said Union Trust Company, individually and as Trustee, as may be proper.

WM. F. HERRIN,

P. F. DUNNE,

WM. D. FENTON,

Solicitors and Attorneys for said Southern Pacific Company.

Service of the foregoing Assignments of Errors admitted this 8th day of January, 1916.

JOHN W. DAVIS,

Solicitor General of the United States.

C. J. SMYTH,

Special Assistant to the Attorney General.

Solicitors and Attorneys for Appellee.

CLARENCE L. REAMES,

United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said Court and cause, an Assignment of Errors by Stephen T. Gage (individually and as trustee), in words and figures as follows, to wit:

DEFENDANT STEPHEN T. GAGE'S (Individually and as Trustee) ASSIGNMENT OF ERRORS.

The defendant, Stephen T. Gage, individually and as trustee, complains of errors in the proceedings in this

case in the District Court of the United States for the District of Oregon, in the above cause, No. 3340 in Equity, and in the decision, judgment and decree rendered, made and entered therein on the 9th day of December, 1915, under and in alleged pursuance of the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915, and assigns the following as the errors complained of:

1. The Court erred in making and entering the said decree of December 9th, 1915.

2. The Court erred in not pursuing the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915.

3. The said decree of December 9th, 1915, is not in pursuance of the said mandate, and the Court accordingly erred in making and entering such decree.

4. The Court erred in making and entering the said decree of December 9th, 1915, and each and every paragraph thereof.

5. The Court erred in adjudging and decreeing, as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him,

or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

6. The Court erred in adding to the term "actual settler," in said paragraph 2, the qualifying phrase "on the land sold to him."

7. The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also from cutting or removing, or authorizing the cutting or removal of any timber thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land containing the mineral or other deposits.

8. The Court erred in its said decree in incorporating into and making part of the general injunction

therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removing or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits.

9. The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

10. The Court erred in not holding and decreeing that the language of the grants herein and of the limitations upon them is general, and that it was not competent to the said Court to attach exceptions thereto in its decree.

11. The Court erred in not holding and decreeing that the terms of the settlers' proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observance of such terms would consist in refraining from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

12. The Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres.

13. The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

14. The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called settlers' proviso or clause in the Granting Act and Acts had application only as and when the railroad company made sales of the land.

15. The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not so holding and decreeing with reference to any mineral or other deposits in or products out of said land—subject to such qualification as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

16. The Court erred in not holding and decreeing that the language of the so-called settlers' clause or proviso in the Granting Act and Acts is not directive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products are concerned, or any or either of them, the grant of the said lands was unqualified.

17. The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such discretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled, as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut, and remove such timber, or to authorize the cutting or removal of the same, and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of the soil thereof—subject to any qualification arising out of the limited injunction referable to the six months' period above mentioned.

18. The Court erred in not holding and decreeing that the railroad company, so long as it occupied the status of an owner of unalienated lands within the limits of the grant and grants, had all the rights therein of a grantee in fee simple, including the rights of such grantee to the timber thereon, or to the mineral or other deposits therein, or to the products of the soil thereof—subject

to any qualification as aforesaid, arising out of said limited injunction.

19. The Court erred in not holding and decreeing that the provisions of the so-called settlers' proviso and clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any qualification as aforesaid arising out of said limited injunction.

20. The Court erred in not holding and decreeing that timber cut upon the granted lands, while the same remained unalienated in the railroad company, belonged to said railroad company; and likewise as to any minerals extracted therefrom, or any products of the soil cultivated thereon—subject to any qualification arising out of said limited injunction, referable to the aforesaid period of six months.

21. The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the so-called settlers' proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

22. The Court erred in making and entering a decree herein in modification and enlargement of the terms

of the mandate from the Supreme Court of the United States.

23. The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein; and in adjudging and decreeing that execution issue against the said defendants, or any or either of them, for any costs or disbursements herein.

25. The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

26. The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called settlers' clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing

that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both below and on appeal; and in not holding and decreeing that inasmuch as the said defendants had prevailed in resisting such contention, it was not equitable to tax them, or either of them, with costs and disbursements herein in favor of the complainant.

27. The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each to bear the costs of his or its own side of the litigation.

28. The Court erred in not making and entering as and for its decree in this cause, and in place and stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by the said last-named defendants and each and every of them—that is to say, in not making and entering as its decree in said cause, the following decree:

“In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust

Company, individually and as trustee, hereinafter called the 'defendants' be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the 'cross-complainants' and 'interveners.'

2. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from any disposition of the said lands or any part thereof, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the

injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

WHEREFORE, this defendant, Stephen T. Gage, individually and as trustee, prays that the aforesaid judgment and decree which was made, rendered and entered herein by the above-entitled Court in said cause No. 3340 in Equity, on the 9th day of December, 1915, and that each of said paragraphs of said judgment and decree be reversed, excepting paragraph 1 thereof, wherein it is provided:

"That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called 'the defendants,' be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross complainants, hereinafter called the 'cross complainants,' and the interveners,"

and particularly that paragraph 2 and that paragraph 7 of said judgment and decree be reversed, and for such other relief to this defendant, said Oregon and California Railroad Company, said Southern Pacific Company, and said Union Trust Company, individually and as Trustee, as may be proper.

WM. F. HERRIN,
P. F. DUNNE,
WM. D. FENTON,

Solicitors and Attorneys for said Stephen T. Gage, individually and as Trustee.

Service of the foregoing Assignments of Errors admitted this 8th day of January, 1916.

JOHN W. DAVIS,
Solicitor General of the United States.

C. J. SMYTH,
Special Assistant to the Attorney General,
Solicitors and Attorneys for Appellee.

CLARENCE L. REAMES,
United States Attorney.

Filed Jan. 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said Court, and cause, an Assignment of Errors by the Union Trust Company (individually and as trustee), in words and figures as follows, to wit:

**DEFENDANT UNION TRUST COMPANY'S
(Individually and as Trustee) ASSIGNMENT
OF ERRORS.**

The defendant, Union Trust Company, individually and as trustee, complains of errors in the proceedings in this case in the District Court of the United States for the District of Oregon, in the above cause, No. 3340 in Equity, and in the decision, judgment and decree rendered, made and entered therein on the 9th day of December, 1915, under and in alleged pursuance of the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915, and assigns the following as the errors complained of:

1. The Court erred in making and entering the said decree of December 9th, 1915.

2. The Court erred in not pursuing the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915.

3. The said decree of December 9th, 1915, is not in pursuance of the said mandate, and the Court accordingly erred in making and entering such decree.

4. The Court erred in making and entering the said decree of December 9th, 1915, and each and every paragraph thereof.

5. The Court erred in adjudging and decreeing, as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing

or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.”

6. The Court erred in adding to the term “actual settler,” in said paragraph 2, the qualifying phrase “on the land sold to him.”

7. The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also from cutting or removing, or authorizing the cutting or removal, of any timber thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or any other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land containing the mineral or other deposits.

8. The Court erred in its said decree in incorporating into and making part of the general injunction therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal, of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in

said lands, except as part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removal or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits.

9. The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

10. The Court erred in not holding and decreeing that the language of the grants herein and of the limitations upon them is general, and that it was not competent to the said Court to attach exceptions thereto in its decree.

11. The Court erred in not holding and decreeing that the terms of the Settlers Proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observance of such terms would consist in refraining from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

12. The Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.

13. The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

14. The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called Settlers Proviso or clause in the Granting Act and Acts had application only as and when the railroad company made sales of the land.

15. The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not so holding and decreeing with reference to any mineral or other deposits in or products out of said lands—subject to such qualification as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

16. The Court erred in not holding and decreeing that the language of the so-called Settlers Clause or proviso in the Granting Act and Acts is not directive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products

are concerned, or any or either of them, the grant of the said lands were unqualified.

17. The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such discretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut and remove such timber, or to authorize the cutting or removal of the same, and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of the soil thereof—subject to any qualification arising out of the limited injunction referable to the six months' period above mentioned.

18. The Court erred in not holding and decreeing that the railroad company, so long as it occupied the status of an owner of unalienated lands within the limits of the grant and grants, had all the rights therein of a grantee in fee simple, including the rights of such grantee to the timber thereon, or to the mineral or other deposits therein, or to the products of the soil thereof—subject to any qualification as aforesaid, arising out of said limited injunction.

19. The Court erred in not holding and decreeing that the provisions of the so-called Settlers Proviso and

clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any qualification as aforesaid arising out of said limited injunction.

20. The Court erred in not holding and decreeing that timber cut upon the granted lands, while the same remained unalienated in the railroad company, belonged to said railroad company; and likewise as to any minerals extracted therefrom, or any products of the soil cultivated thereon—subject to any qualification arising out of said limited injunction, referable to the aforesaid period of six months.

21. The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the so-called Settlers Proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

22. The Court erred in making and entering a decree herein in modification and enlargement of the terms of the mandate from the Supreme Court of the United States.

23. The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme

Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein, and in adjudging and decreeing that execution issue against the said defendants or any or either of them, for any costs or disbursements herein.

25. The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

26. The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called Settlers Clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both below and on appeal; and in not holding and decreeing that inasmuch as the said defend-

ants had prevailed in resisting such contention, it was not equitable to tax them or either of them with costs and disbursements herein in favor of the complainant.

27. The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each to bear the costs of his or its own side of the litigation.

28. The Court erred in not making and entering as and for its decree in this cause, and in place and stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by said last-named defendants and each and every of them:—that is to say, in not making and entering as its decree in said cause the following decree:

“In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the ‘defendants’, be and the same is hereby set aside and held for naught, but is adhered to in all respects as to the

defendants and cross-complainants, hereinafter called the 'cross-complainants' and 'interveners.'

2. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from any disposition of the said lands or any part thereof, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

WHEREFORE, this defendant, Union Trust Company, individually and as trustee, prays that the

aforesaid judgment and decree which was made, rendered and entered herein by the above-entitled Court in said cause No. 3340 in Equity, on the 9th day of December, 1915, and that each of said paragraphs of said judgment and decree be reversed, excepting paragraph 1 thereof, wherein it is provided:

“That the decree heretofore entered in said cause so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called ‘the defendants,’ be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the ‘cross-complainants’ and the interveners,”

and particularly that paragraph 2 and that paragraph 7 of said judgment and decree be reversed, and for such other relief to this defendant, said Oregon & California Railroad Company, said Southern Pacific Company, and said Stephen T. Gage, individually and as trustee, as may be proper.

MILLER, KING, LANE & TRAFFORD,
DOLPH, MALLORY, SIMON & GEARIN,
JOHN C. SPOONER, JOHN M. GEARIN,
Solicitors for said Union Trust Company, individually
and as trustee.

Service of the foregoing Assignments of Errors admitted this 8th day of January, 1916.

JOHN W. DAVIS,
Solicitor-General of the United States.

C. J. SMYTH,

Special Assistant to the Attorney-General.

Solicitors and Attorneys for Appellee.

CLARENCE L. REAMES,

United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said Court and cause, a Bond on Appeal, in words and figures as follows, to wit:

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company of New York, individually and as trustee, the defendants in the above entitled action, as principals, and United States Fidelity and Guaranty Company, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and as such corporation authorized to do business and doing business in the States of California and Oregon, as surety, are held and firmly bound unto the United States of America, the complainant in the above entitled action, in the sum of Fifteen Thousand Dollars (\$15,000), to be paid to the said United States of America, complainant herein, its attorneys, officers, or assigns, and for the payment of which sum, well and truly to be made, we bind ourselves and each of us, and our and each of our successors, associates,

72 *Oregon and California Railroad Company*

heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated this 4th day of January, 1916.

WHEREAS, the said defendants in the above entitled action have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and decree rendered and entered in the above cause No. 3340 in Equity, on the ninth day of December, 1915, which said judgment and decree is hereby referred to and made a part hereof.

NOW, THEREFORE, the condition of this obligation is such that if said defendants in the above entitled action shall prosecute their said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

OREGON AND CALIFORNIA RAILROAD
COMPANY,

By W. R. Scott,
Its Vice-President.

(Corporate Seal)

OREGON AND CALIFORNIA RAILROAD
COMPANY,

By G. L. King,
Its Assistant Secretary.

OREGON AND CALIFORNIA RAILROAD
COMPANY,

By Wm. F. Herrin,

P. F. Dunne,

Wm. D. Fenton,

Its Solicitors.

SOUTHERN PACIFIC COMPANY,

By W. R. Scott,

Its Vice-President.

(Corporate Seal)

SOUTHERN PACIFIC COMPANY,

By G. L. King,

Its Assistant Secretary.

SOUTHERN PACIFIC COMPANY,

By Wm. F. Herrin,

P. F. Dunne,

Wm. D. Fenton,

Its Solicitors.

UNION TRUST COMPANY OF NEW YORK,

individually and as trustee,

By Dolph, Mallory, Simon & Gearin,

Miller, King, Lane & Trafford,

John C. Spooner and John M. Gearin,

Its Attorneys and Solicitors,

and by John M. Gearin, its Attorney in Fact.

STEPHEN T. GAGE,

Individually and as Trustee.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

By H. V. D. Johns,
Its Attorney in Fact, and
Bradley Carr,
Its Attorney in Fact.

(Corporate Seal)

State of California,
City and County of San Francisco,—ss.

On this 4th day of December, in the year one thousand nine hundred and sixteen, before me Hugh T. Sime, a Notary Public, in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared W. R. Scott, known to me to be the Vice-President, and G. L. King, known to me to be the Assistant Secretary, respectively, of the Oregon and California Railroad Company, of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

(Signed) HUGH T. SIME,
Notary Public in and for the City and County of San
Francisco, State of California.
(Notarial Seal)

My commission expires July 2, 1917.

State of California,

City and County of San Francisco,—ss.

On this 4th day of December, in the year one thousand nine hundred and sixteen, before me Hugh T. Sime, a Notary Public, in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared W. R. Scott, known to me to be the Vice-President, and G. L. King, known to me to be the Assistant Secretary, respectively, of the Southern Pacific Company, of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

(Signed) HUGH T. SIME,
Notary Public in and for the City and County of San
Francisco, State of California.

(Notarial Seal)

My commission expires July 2, 1917.

State of California,

City and County of San Francisco,—ss.

On this 4th day of January, in the year one thousand nine hundred and sixteen, before me, M. J. Cleveland, a Notary Public in and for the City and County of San

Francisco, personally appeared H. V. D. Johns and Bradley Carr, known to me to be the persons whose names are subscribed to the within instrument as the Attorneys in Fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as Attorneys in Fact.

(Signed) M. J. CLEVELAND,

Notary Public in and for the City and County of San Francisco, State of California.

(Notarial Seal)

State of California,

City and County of San Francisco,—ss.

On this 4th day of January, in the year one thousand nine hundred and sixteen, before me, E. B. Ryan, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Stephen T. Gage, individually and as trustee, known to me to be the person described in, whose name is subscribed to and who executed the annexed instrument, and he acknowledged to me that he executed the same as such individual and trustee as aforesaid.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year last above written.

(Signed) E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

(Notarial Seal)

My commission expires February 25th, 1918.

The foregoing bond is hereby approved and the same shall operate as a supersedeas as to paragraph 7 of the judgment and decree referred to in said bond.

Done in open court this 8th day of January, 1916.

CHAS. E. WOLVERTON,
Judge of said District Court.

Received a copy of the within bond this 8th day of January, 1916.

JOHN W. DAVIS,
Solicitor-General.

C. J. SMYTH,
Special Assistant to the Attorney-General,
Attorneys for Complainant.

CLARENCE L. REAMES,
United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 24th day of January, 1916, the same being the 73rd judicial day of the regular November, 1915, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

**ORDER EXTENDING TIME TO FILE
STATEMENT OF THE EVIDENCE.**

Now on this 24th day of January, 1916, upon motion of counsel for Oregon and California Railroad Com-

pany, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, defendants above named, for an order of this Court extending and enlarging the time of the said defendants, and each of them, to prepare, serve and file their, and each of their, proposed Statement of the Evidence, or proposed Bill of Exceptions, Statement, or other record as the said parties may deem advisable, complainant appearing by Clarence L. Reames, United States District Attorney, and the said defendants appearing by Wm. D. Fenton and John M. Gearin; and it appearing to the Court that good cause is shown and exists for said order, and that the said defendants are entitled thereto,

IT IS ORDERED that the time for the said defendants, and each of them, in the above entitled cause, to prepare, serve and file in said Court, their and each of their said proposed Statement of Evidence, or Bill of Exceptions, Statement, or other record as they may be advised, be and the same is hereby extended and enlarged to and inclusive of February 5th, 1916.

(Signed) CHARLES E. WOLVERTON,
District Judge.

Filed January 24, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 1st day of February, 1916, there was duly filed in said Court and cause, a Stipulation Relative to Record on Appeal, in words and figures as follows, to wit:

STIPULATION RELATIVE TO RECORD ON
APPEAL.

IT IS HEREBY STIPULATED by and between the complainant, United States of America, and the defendants above named, and each of them, as follows:

1. That on the appeal taken by the above named defendants on the 8th day of January, 1916, to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree made and entered in the United States District Court for the District of Oregon in said cause No. 3340 in Equity, on December 9, 1915, said United States Circuit Court of Appeals may, insofar as the same may be relevant or material, consider the printed transcript of the record filed in said Circuit Court of Appeals on the former appeals taken in said cause No. 3340 from the decree of said United States District Court, entered July 1, 1913, and may consider any part or portions of said transcript, including the pleadings in the cause, the statement of the evidence and the exhibits or any of them contained in said printed transcript of record.

2. That in the event that said United States Circuit Court of Appeals should certify to the Supreme Court of the United States any questions or question or propositions or proposition of law upon which it desires the instruction of that court for its proper decision in passing upon the aforesaid appeal or that said Supreme Court should require that the whole record and cause be sent up to it for its consideration, or in the event that an appeal

should be prosecuted to said Supreme Court from any judgment rendered on the aforesaid appeal of said cause taken on said 8th day of January, 1916, to said United States Circuit Court of Appeals, or that said appeal taken on January 8, 1916, should in any other manner be hereafter brought on for hearing in said Supreme Court, said Supreme Court of the United States may, insofar as the same may be relevant or material, consider the printed transcript of the record on the aforesaid former appeals in said cause, which is now on file in said Supreme Court, including the pleadings, the statement of the evidence and the exhibits or any of them contained in said printed transcript of record.

3. Such printed transcript of the record on said former appeals, as now on file in said Circuit Court of Appeals and also on file in said Supreme Court, shall be deemed a part of the record on the aforesaid appeal taken on January 8, 1916, to said Circuit Court of Appeals, and on any appeal which may be taken to said Supreme Court from the judgment of said Circuit Court of Appeals rendered on said last mentioned appeal or in any other hearing growing out of said appeal which may be had before said Supreme Court as in last above paragraph hereof mentioned; and, as such, it may, insofar as the same may be deemed relevant or material, be referred to by counsel of any of the parties hereto, either in said Circuit Court of Appeals or in said Supreme Court.

4. There shall not be included or printed in the transcript of record on the aforesaid appeal taken by defendants on January 8, 1916, to said United States

Circuit Court of Appeals, any of the pleadings, papers or documents filed, or proceedings had, in said United States District Court in said cause prior to December 8, 1915, and the clerk of the court, in making, and directing the printing of, said transcript of record, shall omit therefrom any of said pleadings, papers, documents or proceedings filed or had in said court and cause prior to December 8, 1915—provided, however, that it may be stated or shown in said transcript on what date the mandate issued by said Supreme Court upon its opinion rendered June 21, 1915, on the former appeals in the cause (No. 679—October term, 1914) was received by the clerk of said United States District Court. Said clerk shall include, among the other papers, documents, files and proceedings to be incorporated in said transcript, a copy of said opinion of the Supreme Court and also a copy of the aforesaid mandate of said Supreme Court filed in said cause in said District Court on December 8, 1915, omitting, however, from the latter, any copy of the copy of the former decree of said United States District Court made and entered July 1, 1913, which is embodied in and forms a part of said mandate. A copy of said former decree shall not be printed in said transcript of record as a part of said mandate, but in the copy of the mandate as printed in said transcript, said former decree may be referred to by reference to the volume and pages of the record on the former appeals taken in said cause wherein a copy of said former decree is set out.

5. If any statement of the record or statement on appeal which may be prepared by the appellants or any of them they may wish to insert a copy of said mandate

in and as a part of said statement, they need not incorporate in said statement of the record or statement on appeal or in any statement of the record or statement on appeal which may be filed by any of them in said cause, a copy of said former decree in said District Court entered July 1, 1913, but they may in said copy of the mandate simply refer to said former decree by reference to the volume and pages of the record on said former appeals wherein a copy of said former decree is set out.

6. It is further stipulated that an order of this court may be made upon this stipulation containing the provisions and substantially in the language as above set forth in paragraphs 4 and 5 hereof.

7. It is further understood and agreed that the complainant denies the right of the defendants to appeal to the Circuit Court of Appeals from the decree entered by said United States District Court on December 9, 1915, denies the jurisdiction of said Circuit Court of Appeals to hear and determine said appeal and reserves its right to object to the defendants prosecuting said appeal and to the jurisdiction of the Circuit Court of Appeals in the matter and that this stipulation shall not in any wise prejudice said rights or any of them, or the right of the complainant to insist upon them, but in the event that said Circuit Court of Appeals takes jurisdiction the complainant does not waive but reserves any right it may have to confine the inquiry of the court on the appeal to a consideration of said mandate of the Supreme Court of the United States and the decree of said District Court entered December 9, 1915.

8. It is further stipulated and agreed in this regard that the sole purpose of this stipulation is to save expense in the printing of the record and to avoid any duplication of the record on the present appeal.

Dated: February 1st, 1916.

CLARENCE L. REAMES,
United States Attorney for Oregon for and by direction
of the Attorney-General of the United States, of
Solicitors and Attorneys for Complainant.

WM. F. HERRIN,
P. F. DUNNE and
WM. D. FENTON,
Solicitors for Oregon and California R. R. Co., Southern
Pacific Co. and Stephen T. Gage, individually and
as trustee,

MILLER, KING, LANE & TRAFFORD,
DOLPH, MALLORY, SIMON & GEARIN,
Solicitors for Union Trust Company, individually and
as trustee.

Filed February 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 1st day of February, 1916, the same being the 80th judicial day of the regular November, 1915, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER REGARDING PRINTING OF
RECORD.

This cause came on for hearing this day upon stipulation of the respective parties, dated January —, 1916, as to the printing of the record on the appeal of the defendants, taken to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree of this court entered December 9, 1915, and as to the use in said Circuit Court of Appeals and in the Supreme Court of the United States, as a part of the record on appeal, of the printed transcript of record of the former appeals taken in above cause No. 3340 from the decree of said District Court for the District of Oregon entered July 1, 1913, and it appearing to the court that the parties have made and filed a written stipulation wherein it is provided, among other things, that an order substantially to the following effect may be made by this court:

It is now therefore ordered that:

1. There shall not be included or printed in the transcript of record on the aforesaid appeal taken by defendants on January 8, 1916, to said United States Circuit Court of Appeals any of the pleadings, papers or documents filed, or proceedings had, in said United States District Court in said cause prior to December 8, 1915, and the clerk of the court, in making, and directing the printing of, said transcript of record, shall omit therefrom any of said pleadings, papers, documents or proceedings filed or had in said court and cause prior to December 8, 1915—provided, however, that it may be stated or shown in said transcript on what date the man-

date issued by said Supreme Court upon its opinion rendered June 21, 1915, on the former appeal of the cause (No. 679—October term, 1914) was received by the clerk of said United States District Court. Said clerk shall include, among the other papers, documents, files and proceedings to be incorporated in said transcript, a copy of said opinion of the Supreme Court and also a copy of the aforesaid mandate of said Supreme Court filed in said cause in said District Court on December 8, 1915, omitting, however, from the latter, any copy of the copy of the former decree of said United States District Court made and entered July 1, 1913, which is embodied in and forms a part of said mandate. A copy of said former decree shall not be printed in said transcript of record as a part of said mandate, but in the copy of the mandate as printed in said transcript, said former decree may be referred to by reference to the volume and pages of the record on the former appeals taken in said cause wherein a copy of said former decree is set out.

2. If in any statement of the record or statement on appeal which may be prepared by the appellants or any of them they may wish to insert a copy of said mandate in and as a part of said statement, they need not incorporate in said statement of the record or statement on appeal or in any statement of the record or statement on appeal which may be filed by any of them in said cause, a copy of said former decree in said District Court entered July 1, 1913, but they may in said copy of the mandate simply refer to said former decree by reference to the volume and pages of the record on said former appeals wherein a copy of said former decree is set out.

3. This order is without prejudice to the right of the complainant to object to the right of the defendants to take said appeal and to the power of the court of appeals to hear and determine it and is not to be construed as a waiver of any right the complainant has to object to the defendants taking said appeal or to the Circuit Court of Appeals hearing and determining it or as a waiver of its right to have the court of appeals confine its inquiry on the appeal to the mandate of said Supreme Court and the decree of this court, entered December 9, 1915.

Dated February 1st, 1916.

CHAS. E. WOLVERTON,
Judge of said District Court.

Filed February 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 1st day of February, 1916, there was duly filed in said court and cause, a Statement of the Case, in words and figures as follows, to wit:

STATEMENT OF THE CASE.

Be it remembered that on the 8th day of December, 1915, the above cause, No. 3340, in Equity, came on for hearing before the above named Court upon the form of the decree to be entered therein under and in pursuance of the mandate theretofore issued from the Supreme Court of the United States on the opinion and decree of said Supreme Court reversing the decree made and entered by the above entitled Court, in said cause, on the first day of July, 1913, and remanding the cause for further proceedings in accordance with said opinion.

Mr. Constantine J. Smyth, special assistant to the Attorney-General, and Mr. Clarence L. Reames, United States District Attorney for the District of Oregon, represented the complainant. Mr. Peter F. Dunne and Mr. Wm. D. Fenton represented the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, and Mr. John M. Gearin, represented the defendant, Union Trust Company of New York, individually and as trustee, and the cross-complainants and interveners in said cause were represented by their respective counsel, Mr. A. W. Lafferty and Mr. L. C. Garrigus.

On motion of counsel for the complainant, the Court ordered that said mandate of the Supreme Court be filed, and the same was thereupon filed with the clerk of this Court.

The complainant, through its counsel, then submitted to the Court the following form of decree as being in conformity with said opinion and mandate of the Supreme Court of the United States, viz:

*"In the District Court of the United States, for the
District of Oregon.*

The United States of America,

Complainant,

vs.

Oregon and California Railroad Company, et al,

Defendants,

John L. Snyder, et al,

Defendants and Cross-Complainants,

William F. Slaughter, et al,

Interveners.

DECREE.

In pursuance of the mandate of the Supreme Court of the United States filed in this court on the —— day of —— in the above entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called "the defendants," be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the "cross-complainants," and the interveners.

2. That the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other

deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing, or authorizing the cutting or removal of the timber thereon or any part thereof; and from removing or authorizing the removal of mineral or other deposits therein; from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to await the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendant all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the

disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so.

5. That this decree shall apply not only to all said grant lands unsold at the time this action was instituted, but also to all such grant lands sold prior to the institution of the action which have since reverted or shall hereafter revert to the defendants or any one of them.

6. That the complainant shall have the right to apply to the court at any time hereafter for an accounting as to all moneys received by the defendant from or on account of the lands covered by said granting acts, and the court retains jurisdiction over the action for the purpose of granting such application if good cause therefor appears.

7. That this decree shall be without prejudice to any other suits, rights or remedies which the government may have by law or under the Joint Resolution of Congress passed April 30, 1908, or under the Act of Congress passed August 20, 1912.

8. That the complainant have and recover from the defendants, Oregon and California Railroad Com-

pany, Southern Pacific Company, Stephen T. Gage, Union Trust Company, the cross-complainants and interveners, and each of them, its lawful costs and disbursements herein, taxed at \$——, and that execution issue therefor.

Done in open court this —— day of December, 1915.

BY THE COURT,

Judge.”

And the counsel for the complainants asked the Court to adopt the aforesaid form of decree submitted by them as the form of decree to be entered upon said mandate.

The defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and the defendant, Union Trust Company of New York, individually and as trustee, then submitted to the Court the following form of decree as being in conformity with said opinion and mandate of the Supreme Court of the United States, viz:

“Title of Court and Cause as contained in foregoing
Form of Decree submitted by the Complainant.

In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the —— day of December, 1915, in the above entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed, as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the "defendants," be, and the same is, hereby set aside, and held for naught, but adhered to in all respects as to the defendants and cross-complainants, hereinafter called the "cross-complainants," and the "interveners."

2. That the said defendants and their respective officers and agents be and each is hereby enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby enjoined from any disposition of the said lands, or any part thereof, or of the timber thereon, and from cutting, or authorizing the cutting, or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands, in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants, all the value the granting acts conferred

upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act.

Done in open court this —— day of ——, 1915.

BY THE COURT,

Judge.”

And the counsel for said defendants asked the Court to sign and to order the entry of a decree in the form submitted by them as being the proper form of decree to be entered upon said mandate.

After arguments had by the respective counsel, the Court took under advisement the matter of the form of the decree to be entered upon said mandate; and on the 9th day of December, 1915, the Honorable Charles E. Wolverton, Judge of this Court, presiding on the aforesaid hearing, signed the following form of decree, viz:

“Title of Court and Cause as contained in foregoing
Form of Decree submitted by the Complainant.

In pursuance of the mandate of the Supreme Court of the United States filed in this court on the 8th day of December, 1915, in the above entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called "the defendants," be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the "cross-complainants," and the interveners.

2. That the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making

or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing, or authorizing the cutting or removal of the timber thereon or any part thereof; from removing or authorizing the removal of mineral or other deposits therein; and from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to wait the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendant all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to mod-

ify this decree in that regard if, in its opinion, good cause shall then exist for doing so.

5. That this decree shall apply not only to all said grant lands unsold at the time this action was instituted, but also to all such grant lands sold prior to the institution of the action which have since reverted or shall hereafter revert to the defendants or any one of them.

6. That this decree shall be without prejudice to any other suits, rights or remedies which the government may have by law or under the Joint Resolution of Congress passed April 30, 1908, or under the Act of Congress passed August 20, 1912, against the defendants or any of them.

7. That the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, its lawful costs and disbursements herein, taxed at \$6249.02, and that execution issue therefor.

Done in open court this 9th day of December, 1915.

BY THE COURT,

(Signed) Charles E. Wolverton,
Judge."

And said decree was thereupon on said 9th day of December, 1915, entered as the judgment and decree of this Court.

The defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T.

Gage, individually and as trustee, and Union Trust Company of New York, individually and as trustee, duly excepted to the entry of said form of decree last mentioned, and also to the failure of said Judge to sign a decree in the aforesaid form submitted by them.

Said defendants now present to the Court this their Statement of the Case, and ask the Court to approve of the same and to direct that it be filed in the Clerk's office of this Court and that it become a part of the record for the purposes of the appeal, taken by said defendants on January 8th, 1916, from said judgment and decree of this Court entered December 9, 1915, as aforesaid. This statement is not intended to be and is not a statement of the case or agreed statement under federal equity rule seventy-seven but is submitted as a statement analogous to the statement of the evidence provided for in federal equity rule seventy-five.

WM. F. HERRIN,

P. F. DUNNE and

WM. D. FENTON,

Attorneys for Appellants, Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee.

MILLER, KING, LANE & TRAFFORD,

DOLPH, MALLORY, SIMON & GEARIN,

Attorneys for Appellant, Union Trust Company of New York, individually and as trustee.

District of Oregon,

County of Multnomah,—ss

Due service of the within statement of the case is admitted this 1st day of February, 1916.

CLARENCE L. REAMES,
of Solicitors for Complainant.

Filed February 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 1st day of February, 1916, the same being the 80th judicial day of the regular November, 1915, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER APPROVING STATEMENT OF THE CASE.

This cause came on to be heard this day upon the application of the appellants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, defendants, for an order approving the statement of the case prepared and presented by the appellants, and now tendered to be filed herein, the appellants appearing by their attorneys Wm. D. Fenton and John M. Gearin, and the complainant appearing by Clarence L. Reames, United States District Attorney for the District of Oregon, representing himself and Thomas W. Gregory, Attorney-General of the United States, and C. J. Smyth, special assistant to the Attorney-General of the United States, attorneys for said complainant; and it

appearing to the Court that said statement is correct and that there is no objection to the approval thereof by this Court,

It is ordered that said Statement of the Case now tendered to be filed is hereby approved and the same is now directed to be filed in the clerk's office of this Court as of this date and to become a part of the record, for the purposes of the appeal heretofore taken by said defendants from the judgment and decree of this Court entered December 9, 1915.

Dated: February 1st, 1916.

CHAS. E. WOLVERTON,
Judge of said District Court.

District of Oregon,
County of Multnomah,—ss.

Due service of the within order approving statement of the case is admitted this 1st day of February, 1916.

CLARENCE L. REAMES,
Of Solicitors for Complainant.

Filed February 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 3rd day of February, 1916, there was duly filed in said Court and cause, a Praeceptum for Transcript of Record on Appeal, in words and figures as follows, to wit:

PRAECIPE FOR TRANSCRIPT.

To G. H. Marsh, Clerk of the above entitled Court:

Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company of New York, individually and as trustee, defendants and appellants herein, request that the following record be printed on the appeal taken by said defendants to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and decree rendered in this Court in said Cause No. 3340 on the 9th day of December, 1915, to-wit:

1. Record of proceedings of December 8, 1915.

2. Mandate of Supreme Court of the United States, filed December 8, 1915, omitting as part of said mandate the copy of the decree of this Court entered July 1, 1913, and inserting therein, in the place where the copy of said decree is inserted in said mandate, the words following, to-wit:

(Here follows copy of said decree of said District Court, as the same is contained in Volume III, pages 1296-1550 of printed transcript of the record on the former appeals taken in this case from said decree of July 1, 1913, and which said transcript of the record is on file in the clerk's office of the Circuit Court of Appeals for the Ninth Circuit, the case being numbered therein 2400, and in the clerk's office of the Supreme Court of the United States, the case in the latter court being numbered 679, October term, 1914.)

3. Opinion of the Supreme Court of the United States, referred to in said mandate.

4. Decree entered December 9, 1915.

5. Cost bill of complainant, filed December 16, 1915.

6. Objections to said cost bill.

7. Order staying execution on aforesaid decree, filed December 27, 1915.

8. Order overruling objections to aforesaid cost bill.

9. Petition for appeal by defendants from decree entered December 9, 1915; filed January 8, 1916.

10. Order of January 8, 1916, allowing said appeal.

11. Assignment of errors on said appeal of Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, severally, being four in number.

12. Bond on said appeal of defendants, and order approving said bond.

13. Citation on said appeal.

14. All orders extending time of defendants to prepare, serve and file their statement of the evidence, or statement of the case, or any other statement or record or papers on appeal from said decree of December 9, 1915.

15. Stipulation regarding record on appeal, filed February 1, 1916.

16. Order regarding record on appeal, filed February 1, 1916.

17. Statement of the case.

18. Order approving said statement of the case.

19. This praecipe.

20. Any and all orders of court, and other documents or papers, relating in any way to the aforesaid appeal taken on January 8, 1916, or to the record on said appeal, which may be filed with you after the filing of this praecipe and before the printing of the record on said appeal is completed.

WM. F. HERRIN,

P. F. DUNNE,

WM. D. FENTON,

Solicitors for Defendants and Appellants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee.

MILLER, KING, LANE & TRAFFORD,

DOLPH, MALLORY, SIMON & GEARIN,

Solicitors for Defendant and Appellant Union Trust Company of New York, individually and as trustee.

Received copy of the foregoing praecipe, and service of same is hereby acknowledged this 3rd day of February, 1916.

T. W. GREGORY,

Attorney-General of the United States.

C. S. SMYTH,

Special Assistant to the Attorney-General of the United States.

Solicitors for Complainant and Appellee.

CLARENCE L. REAMES,

United States Attorney.

Filed February 3, 1916. G. H. Marsh, Clerk.

And to wit, on the 1st day of February, 1916, there was duly filed in said Court and cause, a copy of an order enlarging time to file transcript of record on appeal, in words and figures as follows, to wit:

ORDER ENLARGING TIME TO FILE TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as Trustee, and Union Trust Company, individually and as trustee,

Defendants and Appellants,

v.

United States of America,

Complainant and Appellee.

No.

**ORDER ENLARGING TIME TO FILE
TRANSCRIPT.**

Now, at this time, February 1st, 1916, on motion of counsel for Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, defendants above named and appellants in the above entitled cause, for an order of Court enlarging and extending the time for the said appellants, and each of them, to file with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the record on the appeal heretofore taken by said defendants and appellants from the judgment and decree entered on the 9th day of December, 1915, in the District Court of the United States for the District of Oregon in cause No. 3340 in Equity, in favor of the complainant, and for an order enlarging and extending the time for said defendants and appellants, and each of them, to docket said cause in said Circuit Court of Appeals; and it appearing to the undersigned Judge of the District Court of the United States for the District of Oregon, who signed the citation on said appeal, that good cause is shown and exists for said order;

IT IS ORDERED that the time for said defendants and appellants, and that the time for each of said defendants and appellants to file the record on the aforesaid appeal in said cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and to docket the case with said Clerk, be and the same

is hereby enlarged and extended to and including the 9th day of March, 1916.

CHAS. E. WOLVERTON,
United States District Judge.

Attest:

(Seal) G. H. Marsh,
Clerk, United States District Court,
District of Oregon.

District of Oregon,
County of Multnomah,—ss.

Due service of the within Order and Notice of Application therefor is hereby accepted in said county, Oregon, this 1st day of February, 1916, by receiving a copy thereof duly certified to as such by William D. Fenton, of attorneys for defendants and appellants.

CLARENCE L. REAMES,
of Solicitors for Complainant.

C. J. SMYTH,
Special Assistant to the Attorney General.

Filed February 1, 1916. G. H. Marsh, Clerk.

OPINION OF THE SUPREME COURT OF
THE UNITED STATES, ATTACHED TO
THE FOREGOING TRANSCRIPT PUR-
SUANT TO STIPULATION AND ORDER
OF COURT.

On Certificate from and Writ of Certiorari to the
United States Circuit Court of Appeals
for the Ninth Circuit.

Oregon & California Railroad Company et al.,
Defendants and Appellants,
John L. Snyder et al.,
Cross Complainants and Appellants,
William F. Slaughter et al.,
Interveners and Appellants,
vs.

The United States,

(June 21, 1915.)

This writ brings up for review a decision of the United States District Court for the District of Oregon decreeing the forfeiture of the unsold portion of certain lands granted by Congress to certain railroad companies and quieting title of the United States thereto.

In consequence of a memorial presented to it, Congress, on April 30, 1908, adopted a joint resolution which authorized and directed the Attorney General of the United States to institute and prosecute any and all suits in equity, actions at law, or other proceedings, to enforce any rights or remedies of the United States arising and growing out of either of the following acts of Congress, towit: "An act granting lands to aid in the construction of a railroad and telegraph line from the

Central Pacific Railroad in California, to Portland, in Oregon," approved July 25, 1866, c. 242, 14 Stat. 239, as amended by the acts approved June 25, 1868, c. 80, 15 Stat. 80, and April 10, 1869, c. 27, 16 Stat. 47, and "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," approved May 4, 1870, c. 69, 16 Stat. 94.

The Attorney General was empowered to assert all rights and remedies existing in favor of the United States, including the claim on behalf of the United States that the lands granted by such acts, or any part of the lands, have been or are forfeited to the United States by reason of any breaches or violations of the terms or conditions of either of such acts which may be alleged or established in such suits, actions or proceedings.

The resolution declared that it was not intended to determine the right of the United States to any such forfeiture or forfeitures, but to fully authorize the Attorney General to assert on behalf of the United States, and the court or courts before which such suits, actions or proceedings might be instituted or pending to entertain, consider and adjudicate, the claim and right of the United States to such forfeiture or forfeitures, and, if found, to enforce the same. Res. 18, 35 Stat. 571.

Being so authorized, the United States brought this suit as complainant against the Oregon & California Railroad Company, the Southern Pacific Company, Stephen T. Gage (individually and as trustee), the Union Trust Company (individually and as trustee), John L.

Snyder, and certain others as defendants, to declare forfeited to the United States lands of the Oregon & California Railroad Company aggregating 2,300,000 acres which inured to the predecessors in interest of the company under the acts of Congress referred to in the resolution.

The bill set forth the acts of Congress and alleged that it was expressed that neither the amendatory act of April 10, 1869, nor the act of 1866 should be construed to entitle more than one company to the grant of land, and that following such provision which was in the act of 1869 there was this proviso: "And provided further, That the lands granted by the act aforesaid (act of 1866) shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

That the act of May 4, 1870, also contained the provision (section 4) that the lands granted thereby, excepting only such as were necessary for depots and other needful uses in operating the road, "should be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre."

The bill also detailed the organization of companies and the steps taken by them to avail themselves of the grants and accomplish the purpose for which they were made; the steps and proceedings in the construction of the roads contemplated; the issue of patents for the

lands granted; the amount of land sold and unsold, and wherein and by what acts there had been breaches of the provisions of the acts above set forth, which were alleged to have been conditions subsequent, and that by such breaches the grants had become forfeited. The bill likewise detailed the various steps and the proceedings whereby the Oregon & California Railroad Company became the owner of the grants, the connection of the defendants, Southern Pacific Company, Gage and the Union Trust Company therewith, and the rights they asserted therein.

It was alleged that each of the other defendants (other than the railroad company, the Southern Pacific Company, Gage and the Union Trust Company) asserted an interest in the lands, created, as they alleged, by actual settlement in good faith upon certain of the unsold lands, not exceeding one quarter section, with intention of making a permanent home thereof, and had applied to the railroad company to purchase the same; that the said defendants had instituted suits against the railroad company, Gage and the Union Trust Company to compel a sale and conveyance of the lands to them; that unless enjoined they would prosecute their suits to final judgments, and that they were hence made parties to this suit in order that they might be so enjoined, and, if the court so order, be permitted to set forth their respective claims for adjudication.

The bill prayed a forfeiture of the unsold lands and that the title of the Government thereto be quieted, or, if such relief be denied, that the lands be adjudged sub-

ject to purchase by actual settlers in quantities not exceeding 160 acres to any one purchaser and at a price not exceeding \$2.50 per acre; that a receiver be appointed to sell the lands and account for the proceeds "as the court shall direct."

If such relief be denied, that a mandatory injunction issue requiring the railroad company to offer for sale and to sell the lands as required by the grants. And the bill also prayed that all of the defendants be enjoined from asserting any right, title or interest in and to the lands or committing waste thereon and for an accounting of all moneys received from the sale of lands or timber.

The persons who asserted interests acquired by actual settlement were made parties to this suit and the causes consolidated, and Snyder and others filed cross complaints herein setting up their alleged rights. And there were about 6,000 other persons who by the court were permitted as interveners to present their claims for consideration and adjudication. They are represented in the record by the petition and papers of B. W. Nunnally and others.

The cross complainants alleged that they were actual settlers upon the lands granted by the act of May 4, 1870, long prior to the institution of any suit or the assertion of any claim of forfeiture by the Government; and the petitions in intervention averred that the petitioners were applicants to purchase lands granted by that act or the act of July 25, 1866; and both cross complaints and petitions respectively alleged in sub-

stance that the lands were granted in trust to the respective grantee companies for actual settlers or those who should become such, and alleged respectively tender of the purchase price, demand for conveyances and the refusal of the railroad company to accept the tender or make the conveyances. And both cross complainants and interveners asserted a prior right to the extent of the land demanded by them, respectively; denied that the grants had become forfeited, and resisted the relief prayed by the Government. They adopted in all other particulars the allegations of the bill and relied upon them as the basis of their respective claims; prayed that the railroad company be decreed to hold in trust the legal title to the land respectively claimed by them, that their several rights be established and enforced, and that the railroad company be directed to convey to each of them the tract of land applied for by each, and for general relief.

Demurrers were sustained to the cross complaints and to the petitions in intervention. Demurrers to the bill were overruled. 186 Fed. Rep. 861. Joint and several answers were then filed by the railroad company, the Southern Pacific Company and Gage. The Union Trust Company answered separately. These companies when referred to collectively will be called defendants.

The answers admitted most of the allegations of the bill and denied others; alleged facts in resistance to the construction of the Government of the acts of Congress and to the relief prayed, justified the alleged breaches of the conditions or covenants of the grants, and set up

laches, waiver of the breaches, and statutes of limitation.

A great deal of testimony was taken, but the case was practically submitted and a decree entered upon a stipulation of facts made by the Government and defendants. It of itself is quite voluminous, but we deem only certain of its facts material.

By the act of July 25, 1866, *supra*, (c. 242, 14 Stat. 239) Congress authorized and empowered the California & Oregon Railroad Company, which had been organized under a statute of the State of California, and such company, organized under the laws of Oregon, as the legislature of that State should designate, to construct and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad in California, as follows: The California & Oregon Company to construct that part of the railroad and telegraph line within the State of California, beginning at a point to be selected by the company on the Central Pacific Railroad in Sacramento Valley, and running thence northerly through the Sacramento and Shasta Valleys to the northern boundary of the State. The Oregon company to construct the part in Oregon from Portland south through certain designated valleys to the southern boundary of Oregon to connect with the part constructed by the first-named company. Whichever company first completed its respective part of the road from the designated terminus to the boundary line between the States was authorized to continue construction until the parts should meet and connect, and the whole line of railroad and telegraph should be completed.

Section 2 of the act granted to the companies, their successors and assigns, "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line."

In case of deficiency in the original sections granted other lands might be selected in lieu thereof. Upon the filing of the survey of the railroad the lands granted were to be withdrawn from public sale so far as located within the limits designated. And it was provided that the lands granted should be applied to the building of the said road within the States, respectively, wherein they were situated; and that the lands reserved by the Government should not be sold except at double the minimum price of public lands, with provisions for sale to actual settlers under the preemption and the homestead laws.

Section 3 granted to the companies the right of way through the public lands "for the construction of said railroad and telegraph line" 100 feet in width on each side of the road, including grounds for stations, etc., and the right to take from the public lands materials for the construction of the road.

Section 4 provided that when 20 or more consecutive miles of any portion of the railroad and telegraph line should be ready for the service contemplated, commis-

sioners should be appointed by the President to examine the same, and if it should appear that 20 miles had been completed and equipped in all respects as required by the act, and the commissioners should so report under oath to the President of the United States, patents should issue to the companies or either of them, as the case might be, to the extent of the completed section, and successively as 20 or more miles should be constructed, until the entire railroad and telegraph line authorized by the act should be constructed, and patents to the lands granted should be issued.

Section 5 expressed that the grants were made upon the condition that the companies should keep the railroad and telegraph in repair and use and transport the mails and dispatches for the Government when required to do so by any department thereof; that the Government should have the preference in the use of the railroad and telegraph at reasonable rates not exceeding those paid by private parties, and that the road should remain a public highway for the use of the Government, free of toll or other charges upon the transportation of the property or troops of the United States, and at the cost and charge of the corporation or companies.

Section 6 required assent to the act to be filed in the Department of the Interior within one year after the passage of the act, and that the first section of 20 miles should be completed within two years and 20 miles in each year thereafter, and the whole on or before July 1, 1875; and the road to be of the same gauge as the

Central Pacific Railroad of California and be connected therewith.

Section 7 required the roads to be operated and used as one connected and continuous line and afford to the Government and the public equal advantages and facilities as to rates, time and transportation.

Section 8 provided that for failure to file assent to the act or to complete the road as required the act should be null and void, "and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of such failure, shall revert to the United States." And it was provided if the road and telegraph should not be kept in repair and fit for use the United States might put the same in repair and use and might devote the income of the road and telegraph line to repay all expenditure caused by the default of the companies or either of them, or might fix pecuniary responsibility not exceeding the value of the lands granted.

Section 9 provided that wherever the word "company" or "companies" was used in the act it should be construed to embrace the words "their associates, successors and assigns" the same as if the words had been inserted or thereto annexed.

Sections 10 and 11 are not material to be quoted. And Section 12 provided that Congress might, at any time, having due regard for the right of the companies, "add to, alter, amend or repeal" the act.

To avail of the grant, the Oregon Central Railroad Company was incorporated October 6, 1866. It

projected its road from Portland to Forest Grove, thence southerly on the westerly side of the Willamette River and became known as the "West Side Company" and its railroad line as the "West Side Line."

The legislature of Oregon, by joint resolution adopted October 10, 1866, designated the Oregon Central as the road to receive the land grant. (There were certain steps in the organization of the Company not important.)

The assent of the company to the act of 1866 was filed in the office of the Secretary of the Interior and subsequently (August 20, 1868) a map of survey of its projected line.

April 22, 1867, certain persons, contending that the West Side Company had not been lawfully incorporated or organized, and designing to secure the grants and other benefits under the act of 1866, caused proceedings to be taken, intending to organize under the general laws of Oregon the Oregon Central Railroad Company of Salem, and so named in its articles of incorporation. It projected its line of railroad on the easterly side of the Willamette River and became known as the "East Side Company" and its railroad line as the "East Side Line."

In furtherance of its design it procured from the legislature of Oregon on October 20, 1868, the adoption of a joint resolution which declared that the West Side Company was not properly incorporated and was incapable of receiving the grant, and designated the Ore-

gon Central Railroad Company organized at Salem on April 22, 1867, "as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the said act of Congress." Oregon Session Laws, 1868.

Controversy arose between the companies as to which was entitled to the benefits of the act of 1866, which controversy continued until about January, 1870.

The controversy was carried to Congress and on April 10, 1869, Congress passed an act which amended section 6 of the act of 1866 so as to allow any railroad company theretofore designated by the legislature of Oregon to file its assent to the act of 1866 within one year from the date of the amending act and providing that nothing therein contained should impair any rights theretofore acquired by any railroad company; but declaring that neither the act of 1866 nor the amending act should be construed to entitle more than one company to a grant of land. *"And provided further, That the lands granted by the act aforesaid (act of 1866) shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."*

On June 8, 1869, the East Side Company adopted a resolution which recited the act of July, 1866, its designation by the legislature of Oregon as the company to receive the grant, the passage of the act of April 10, 1869, and concluded as follows: "This company, the Oregon Central Railroad of Salem, Oregon, * * * do hereby accept all the provisions, rights, privileges,

and franchises of said act of July 25, 1866, * * * and of all acts amendatory thereof, and upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto."

A certified copy of the resolution was filed in the office of the Secretary of the Interior June 30, 1869, and in the following October a map of survey of location of the first 60 miles of the projected line. On December 24th, following, the company completed the first 20 miles within the prescribed time, and the same was examined and approved by commissioners appointed therefor pursuant to the provisions of section 4 of the act of 1866.

March 16, 1870, the Oregon & California Railroad Company was incorporated, and, on March 29, 1870, the East Side Company assigned to it all of its property, including the land grant, with present and future rights under the act of July, 1866, and acts amendatory thereof and supplemental thereto, and by virtue of any act or resolution of the legislature of Oregon, and by the action of its stockholders the East Side Company was dissolved and its stock canceled.

Resolutions were adopted by the Oregon & California Railroad Company accepting the transfer and also a resolution accepting the act of 1866 and amendments thereto, and "all the benefits and emoluments therein or thereof granted, and upon the terms and conditions therein specified", and authorizing its assent to be filed with the Secretary of the Interior and a copy of the deed of assignment from the Oregon Central

Railroad Company. This was done, and since the date of the transfer (March 29, 1870) the Oregon & California Railroad Company has assumed and still assumes itself to be the successor of the East Side Company and of all its rights under the acts of Congress.

The West Side Company abandoned all claims under the act of 1866 and solicited and obtained from Congress, by the act of May 4, 1870, a grant of other lands. The act recited (Sec. 1) that for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamkill River, near Mc-Minnville, in the State of Oregon, there is granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands, and the right to take materials from the public lands and necessary lands for depots, etc., not exceeding 40 acres at any one place; and also 20 alternate sections per mile of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers, not disposed of or reserved or held by valid preemption or homestead rights at the time of the passage of the act.

There was the usual provision for selecting other lands in case of deficiency; the survey of the lands along the line of the railroad; the segregation of lands upon the survey and location of 20 or more miles of road; and for the disposition of the lands reserved by the Government within the limits of the grant only to actual settlers at double the minimum price for such lands.

The issuance of patents was provided (Sec. 3) upon the completion and equipment of 20 mile sections of the railroad.

By section 4 it was enacted "That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre."

It was provided (Sec. 5) that the Company should, by mortgage or deed of trust to two or more trustees, appropriate and set apart the net proceeds of the lands as a sinking fund, to be kept invested in United States bonds or other safe securities for the purchase from time to time of the first mortgage construction bonds on the road, depots, etc., and that no part of the funds should be applied to any other purpose until all of the bonds should have been purchased or redeemed or canceled.

An assent to the act was required to be filed with the Secretary of the Interior (Sec. 6) and it was expressed that the grant was upon the condition that 20 miles or more of the road should be completed within two years and the entire road and telegraph line within six years from the date of the act.

In this act Congress, by the words "Oregon Central Railroad Company," referred to the West Side Company.

On July 20, 1870, the West Side Company filed its assent to the act in the office of the Secretary of the Interior.

During the year 1870 the Oregon & California Railroad Company procured, by mortgage bonds, approximately \$8,000,000, and during the year 1871 the West Side Company in the same way procured about \$1,000,000. With the funds thus procured the lines of railroad contemplated by the act of 1866 and the act of May 4, 1870, respectively, were prosecuted continuously until about January, 1873.

As stated, the East Side Company completed the construction of the first 20 miles of its railroad, and the Oregon & California Railroad Company, after the assignment and transfer to it, as stated, continued construction in 1870, 1871 and 1872 for a distance of approximately 197 miles; and the West Side Company, with the funds procured by it in 1871, constructed its line under the act of 1870 from Portland to McMinnville, a distance of approximately 47 miles. There was no other construction by the West Side Company, and the lands contiguous to the line of road from Forest Grove to Astoria was forfeited by act of Congress of January 31, 1885.

Financial vicissitudes came to both companies and construction was suspended. It was never resumed by the West Side Company, and the East Side Company, under its new name of Oregon & California Railroad Company, finally became, by the assignment of the West Side Company, the owner of the grants under both acts.

The consideration of the conveyance was the payment of the debts of the West Side Company. Since the date of the conveyance the Oregon & California Railroad Company has assumed and still assumes itself to be the successor of the West Side Company in and to all of the rights, franchises and property granted or intended to be granted by the act of May 4, 1870.

Further financial difficulties impeded the construction of the road and these were met by the various processes detailed in the stipulation of facts, and which we omit except as referred to in the opinion. Among these were a cancellation of the stock of the company and a reissue secured by a trust deed, of which Stephen T. Gage became the only surviving trustee, an issue of bonds, the trust deed to the Union Trust Company, leases to the Southern Pacific Company and the final control by that company through stock ownership of all of the properties and land grants. That company thereafter administered the land grants. These transactions were alleged as breaches of the conditions which, it is contended, were constituted by the provisos in the respective acts given above, providing for the sale of the granted lands to actual settlers.

163,430.28 acres of the granted lands were sold by the Oregon & California Railroad Company prior to May 12, 1887, nearly all of which were sold to actual settlers, in small quantities, although in a few instances the quantities exceeded 160 acres to one purchaser and the prices were slightly in excess of \$2.50 an acre. A rapidly increasing demand for the lands in large quantities and at

increased prices commenced about 1889 or 1890 and has continued ever since. From 1894 to 1903 some of the granted lands were sold to persons not actual settlers in quantities and at prices exceeding the maximum designated in the provisos, and in several instances in quantities of from 1,000 to 20,000 acres to one purchaser at prices ranging from \$5 to \$40 an acre—and in one instance a sale of 45,000 acres at \$7 an acre to a single purchaser. About 5,306 sales were made, aggregating 820,000 acres, of which sales about 4,930 were for quantities not exceeding 160 acres and 376 sales in quantities exceeding 160 acres to one purchaser, aggregating 524,000 acres. The latter sales were to persons other than actual settlers and for other purposes than settlement and at prices in excess of \$2.50 an acre; and approximately 478,000 acres were sold since 1897 and approximately 370,000 of the 524,000 were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser. Approximately three-fourths of all sales made since 1897 were made by contracts providing for the payment of the purchase price in from five to ten annual payments and execution of conveyance upon final payment, a considerable number of which contracts were pending when this suit was brought.

On January 1, 1903, the company withdrew from sale all of its lands and refused to accept offers for any of them, asserting that they were timber lands and unsuitable for settlement. At the time the answer was filed there remained unsold 2,360,492.81 acres, of which 2,075,616.45 acres were theretofore patented under the land grant acts, and 284,876.36 at that time remained un-

patented, all of which are claimed by the company under the land grants.

Since January, 1903, over 4,000 persons have applied to purchase certain of the unsold lands, claiming that they desired to do so for the purpose of settling and establishing homes thereon and each applicant stated that he was willing and able to tender at the rate of \$2.50 per acre therefor. Until about the year 1890 or 1891 there was substantially no demand for the granted lands except for the purpose of settlement, and nearly all of the sales prior to the year 1894 were made for settlement and to settlers.

Prior to 1894 the company maintained an immigration bureau to induce settlement upon the lands, and the greater part of the sales made after that year were to persons not settlers and for prices exceeding \$2.50 per acre.

It was testified that the gross amount of lands that inured to the Oregon & California Railroad Company under both the East Side and the West Side grants was 3,182,169.57 acres, and it was stipulated that between the years 1871 and 1906 there were patented under the East Side grant 2,745,786.68 acres and between the years 1895 and 1903 there were patented under the West Side grant 128,618.13 acres, leaving unpatented 307,764.76 acres.

At the time the answer was filed there remained unsold of the granted lands 2,360,492.81 acres, of which 2,075,616.45 acres were theretofore patented to the Oregon & California Railroad Company under the land

grants and 284,876.36 thereof at that time remained unpatented, all of which unsold lands are claimed by the railroad company under and by virtue of the grants. The reasonable value of said unsold lands exceed the sum of \$30,000,000. There is a table attached to the answer showing the net amount received by the railroad company to be, after all disbursements, \$2,495,094.03. (The bill, as we have seen and shall presently more at length refer to, prays a forfeiture of the unsold lands only.)

Pursuant to the rules and regulations of the Interior Department, all of the patents were issued to and based upon applications in writing therefor from time to time filed in the appropriate land office of the United States by the Oregon & California Railroad Company as the "successor and assign" of the East Side Company and the West Side Company, respectively. Each application was accompanied by an affidavit which alleged, among other things, the following: "The said lands are vacant, unappropriated, are not interdicted mineral, nor reserved lands, and are of the character contemplated by the granting act" under which the patents were applied for.

The stipulation sets out the creation of an Auditor of Railroad Accounts, and subsequently the creation of a Commissioner of Railroads, and his duties by various acts of Congress until 1904, when the bureau was terminated and the duties, files and records thereof were transferred to the Secretary of the Interior, and that from 1879 to and including 1903 reports were made of the transactions of the Land Department of the Ore-

gon & California Railroad Company upon blanks furnished by such bureau. The details of the reports are given, which show many sales of the lands in excess of \$2.50 per acre.

The bureau, it is stipulated, made annual reports to the Secretary of the Interior which were embodied in his annual reports to the President and by the President forwarded to Congress, where they were referred to appropriate committees and printed as executive documents.

These reports show the administration of the grants by the company, the number of acres received under the grants, the number sold and at what prices, some of which exceeded \$2.50 per acre, and that the price asked for lands not sold was in excess of that sum per acre.

After stating the case as above, MR. JUSTICE McKENNA delivered the opinion of the Court.

A direct and simple description of the case would seem to be that it presents for judgment a few provisions in two acts of Congress which neither of themselves nor from the context demand much effort of interpretation or construction. But the case has never been considered as having that simple directness. A bill which occupies 78 pages of the record (exclusive of exhibits), the allegations of which are iterated and reiterated by cross complainants and interveners and added to, and an answer that admitted or traversed their averments with equal volume and circumstance, constituted the case for trial. Seventeen volumes of testimony, each of many

pages, were deemed necessary to sustain the case as made. It is certain, therefore, that no averment has been omitted from the pleadings; no fact from the testimony that has any bearing on the case; the industry of counsel has neglected no statute or citation, and their ability no comment or reason that can elucidate or persuade. As we proceed it will be seen that we have rejected some contentions. It is not the fault of counsel if we have misunderstood them.

Yet, with all the research, it may be on account of it, the contestants have not preserved an exact alignment and have shown no preference as to the company in which contentions are made or opposed.

The Government contends that the provisos, we so designate them and shall so refer to them, though they differ in technical language, constitute conditions subsequent and that by the alleged breaches indicated the lands became forfeited to the United States. The railroad company and other defendants contend that the provisos constitute restrictive and unenforceable covenants. The cross complainants insist that a trust was created for actual settlers and the interveners urge that the trust has the broader scope of including all persons who desire to make actual settlement upon the lands.

This curious situation is presented: The Government joins with the railroad in opposing the contentions of the cross complainants and interveners. Both of the latter unite with the Government in contesting the position of the railroad but join with the railroad against the Government's assertion of forfeiture. The cross

complainants attack the claim of the interveners, and the State of Oregon, through its Attorney General, without definitely taking sides in the controversies, declares it to be to the interest of the State and expresses the hope that the lands now withdrawn by the railroad shall be "subject to settlement and improvement as contemplated by the provisions of the grant, in order that these vast areas of the State may be improved, but also that the lands may not be withdrawn from taxation, thus depriving the State, and especially the eighteen counties in which they are situated, of a large proportion of their resources from direct taxation." The interest and hope expressed seem like a prayer against the Government's contention.

There is something more in these opposing contentions than a wrangle or medley of interests, and we are admonished that the words of the provisos, simple and direct as they are of themselves, take on, when they come to be applied, ambiguous and disputable meaning. It may be said at the outset that if ambiguity exists there may be argument in it against some of the contentions.

However, without anticipating, let us consider the provisos, and we repeat them to have them immediately under our eyes. The first is contained in the act of April 10, 1869. That act was expressed to be an amendment of the act of 1866 and to relieve from the effect of the expiration of the time for filing assent to the act of 1866 and to give "such filing of assent, if done within one year from the passage of the" amending act, the same force and effect to all intents and purposes as if it had been filed within one year after the passage of the act of 1866.

Then came this proviso, which was preceded by another not necessary to quote: "*And provided further, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.*"

The act of May 4, 1870, making the grant to the West Side Company, provides in section 4 that the lands granted, excepting only such as are necessary for depots and other needful uses in operating the road, "shall be sold by the company to actual settlers," the quantities and the price being designated as in the act of 1869.

These, then, are the provisos which are submitted for construction. The contention of the Government is as we have seen, and it lies at the foundation of its assertion of forfeiture of the grant, that they constitute conditions subsequent.

The argument to support the contention is based first on the general considerations that experience had demonstrated to the country the evils of unrestricted grants, and that the bounty of Congress had been perverted into a means of enriching "a few financial adventurers," and that lands granted for national purposes "were disposed of in large blocks to speculators as well as to development companies organized by officers of the railroad companies." Informed by such experience, in substance is the contention, and solicited by petition and moved by the reasoning of some of its members, Congress changed its policy of unqualified bounty, and, while not refusing to contribute to the aid of great enterprises, sought to

prevent the perversion of such aid to selfish and personal ends, and to promote the development of the country by the disposition to actual settlers of the lands granted. And, it is insisted, efficient means were adopted to secure the purpose by making the provisos conditions subsequent, with the sanction of forfeiture for violation.

These general considerations are supplemented by a special and technical argument. The provisos and their context, it is said, show the general characteristics of conditions, that is, they make the estate granted and its continuance to depend upon the doing of something by the grantee, and that the proviso in the act of 1869 is expressed in apt and technical words, by the use of which, it is further contended, it is established by authority that an estate upon condition is necessarily created. Cases are cited, and the following is quoted from page 121 of Sheppard's Touchstone: "That for the most part conditions have conditional words in their frontispiece and do begin therewith; and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of re-entry, in the conclusion of the condition, do make the estate conditional, as *proviso, ita quod, and sub conditione*. . . . But there are other words, as *si, si contingat*, and the like, that will make an estate conditional also, but then they must have other words joined with them and added to them in the close of the condition, as that then the grantor shall reenter, or that then the estate shall be void, or the like." And words of such determining effect, it is urged, introduce and give meaning to the proviso in the amendatory act of 1869.

But it will be observed there are no such controlling words in the provision for the sale to actual settlers in the act of May 4, 1870, that is, in the grant to the West Side Company; and the Government is confronted by the rule which it quotes, that in such cases there must be "words of reentry" or a declaration "that then the estate shall be void, or the like." The Government, therefore, varies and relaxes the rule it invokes and admits that the sense of a law or terms of an instrument may be found in other words than the quoted technical ones if the intention is made clear.

It is not necessary to review the cases cited respectively to sustain and oppose the contending arguments. The principles announced in the cases are rudimentary and may be assumed to be known and the final test of their application to be the intention of the grantor.

These principles will be kept in mind in our consideration of the acts of Congress involved, and, besides, that there may be a difference in rigor between public and private grants and that this court has especially said that railroad land grants have the command and necessarily, therefore, the effect of law.

The Government reinforces its contention, as we have seen, with what it considers a change of policy in legislation and in effect insists that restrictions upon the disposition of the lands granted became more dominant in purpose than the building of the roads, to aid which it was admitted the lands were necessary. The argument is hard to handle, as indeed are all arguments which attempt to assign the exact or relative inducements to conjoint pur-

poses. In the first grants to railroads there were no restrictions upon the disposition of the lands. They were given as aids to enterprises of great magnitude and uncertain success and which might not have succeeded under a restrictive or qualified aid. However, a change of times and conditions brought a change in policy, and while there was a definite and distinct purpose to aid the building of other railroads, there was also the purpose to restrict the sale of the granted lands to actual settlers. These purposes should be kept in mind and in their proper relation and subordination.

We shall be led into error if we conclude that because the railroad is attained it was from the beginning an assured success, and that it was a secondary and not a primary purpose of the acts of Congress. There is much in the argument of the defendants that the aid to the company was part of the national purpose, which this court has said induced the grants to the transcontinental railroads (91 U. S. 79; 99 U. S. 48; *United States v. Sanford*, 161 U. S. 412). And we may say that the policy was justified by success. Empire was given a path westward and prosperous commonwealths took the place of a wilderness.

But such success had not been achieved when the grant of 1866 was made nor in full measure when the acts of 1869 and 1870 were passed, and it may be conceded that they were intended to continue and complete such national purpose, and that it was of the first consideration, but the secondary purpose was regarded and provided for in the provisos under review. Both pur-

poses must be considered. It may be that it was not expected that actual settlers would crowd into "the vast unpeopled territory," but the existence of such settlers at some time must have been contemplated. Both purposes, we repeat, were to be subserved, and how to be subserved is the problem of the case.

There is certainly a first impression against a forfeiture being the solution of the problem or that there was a necessity for it. A forfeiture of the grant might have been the destruction of the enterprise, and settlement postponed or made impossible to any useful extent by the inaccessibility of the lands. And forfeiture was besides beset with many practical difficulties as a remedy. When, indeed, would it be incurred? The obligation of the provisos and the remedy for their breach were coincident. The refusal of the demand of the first actual settler (if there could be such without the consent of the railroad) or of the first applicant for settlement would subvert the scheme of the acts of Congress. It cannot be that the grants were intended to be so dependent and precarious and the enterprises so menaced with peril and, it might be, brought to disaster.

Are the contingencies fanciful? Such character may be asserted of any conjecture of what might have occurred but which did not, and yet to construe a statute we must realize its inducements and aims, solving disputes about them by a consideration of what might accomplish or defeat such aims. The acts under review conferred rights as well as imposed obligations, and it could not have been intended that the latter should be so

enforced as to defeat the former. We have given an instance of how this might be done by regarding the provisos as conditions subsequent. Another instance may be given. In its argument at bar the Government insisted that it was the duty of the railroad company to have provided the machinery for settlement and, by optional sales, guarded by probational occupation of the lands, to demonstrate not only initial but the continued good faith of settlers, and that the omission to do so was of itself a breach of the provisos and incurred a forfeiture of the grants. But when did such obligation attach? Before or after the construction of the road—construction in sections or completely? The contention encounters the Government's admission that there was no obligation imposed upon the railroad to sell. And we have the curious situation (which is made something of by cross complainants and interveners in opposition to the Government's contention) of the right of settlers to buy but no obligation on the railroad to sell, and yet a duty of providing for sales under an extreme and drastic penalty. We may repeat the question, Might not such consequences have ended the enterprise, making it and its great purpose subordinate to local settlement? Indeed, might not both have been defeated by the inversion of their purposes.

The omission to institute a plan of settlement and sale is not alleged in the bill as a breach of the provisos. The first breach alleged is the trust deed to Stephen T. Gage, and the next the trust deed to the Union Trust Company. But these deeds manifestly were but forms of security, even if they went too far and were not bind-

ing to the extent of their excess. The Government admits that the grants were intended to be used as a basis of credit; and we have argument again against a forfeiture by the dilemma to which the railroad might be brought in its attempt to comply with all the provisions of the act as well as with the provisos. If it failed to complete the road within the time required the granting act was to become "null and void," (upon which we shall presently comment). If it made efforts to complete the road by using the grants as a means of credit it might forfeit them.

But there is a better argument than what may be deduced from the solution of perplexing difficulties or the conjecture of possible contingencies. It will be observed that there was an explicit provision in the act of 1866 that upon the failure of the companies to file assent to the act and to complete the road as and within the time required, the act should "be null and void" and the lands not patented at the time of such failure should "revert to the United States." And it was provided that if the road should not be "kept in repair and fit for use", Congress by legislation might put the same in that condition and repay its expenditures from the road's income or fix pecuniary responsibility upon the company not exceeding the value of the lands granted.

Congress, therefore, had under consideration remedies for violations of the provisions of the act and adjusted them according to what it considered the exigency. As a penalty for not completing the road as prescribed Congress declared only for a reversion of

the lands *not then patented*; for not maintaining it in repair and use Congress reserved the right temporarily to sequester the road; and yet for a violation of the provision for sale to settlers it is urged that Congress condemned to forfeiture not only the lands then *unpatented but those patented*. Mark the difference. Was non-completion of the road of less consequence than settlement along its line?—not necessarily complete settlement, but any settlement—the refusal, it might be, of the acceptance of a single offer of settlement or even, as it is contended, of making provision for settlement, being of greater consequence and denounced by more severe penalty than the declared conditions, that is, assent to the act, completion of the road, and its maintenance. This is difficult, if not impossible to believe.

It appears, therefore, that the acts of Congress have no such certainty as to establish forfeiture of the grants as their sanction, nor necessity for it to secure the accomplishment of their purposes,—either of the construction of the road or sale to actual settlers—and we think the principle must govern that conditions subsequent are not favored but are always strictly construed, and where there are doubts whether a clause be a covenant or condition the courts will incline against the latter construction; indeed, always construe clauses in deeds as covenants rather than as conditions, if it is possible to do so. 2 Washburn on Real Property, 4. And this because “they are clauses of contingency on the happening of which the estates granted may be defeated.” And it is a general principle that a court of equity is reluctant

to (some authorities say never will) lend its aid to enforce a forfeiture.

By this conclusion do we leave the provisos meaningless and the Government without remedy for their violation? There is no argument in a negative answer. From the defects of a provision we can deduce nothing nor on account of them substitute one of greater efficacy.

But must the answer be in the negative, and by rejecting the contention of the Government are we compelled to accept that of the railroad company?—or we may say those of the railroad company, for the contentions are many, some of which preclude the application of the provisos, some of which assert their invalidity and others limit their application.

If not first in order, at least in more immediate connection with the contention of the Government is the contention that the provisos are not conditions subsequent but simple covenants, and, it is said, restrictive and negative only, and therefore not enforceable. In support of the contention all of the uncertainties or asserted uncertainties of the provisos are marshaled and amplified. We can only enumerate them. There is uncertainty, it is asserted, in the legal measure of duty, therefore of its performance—for whom to be performed and when; nor is the time or condition of settlement prescribed, whether by the standard of the homestead or preemption laws; nor by what test or by what tribunal contests between applicants to purchase are to be determined; no compulsion of sale at any time, to any person, in any

quantity; no mutuality in the covenant; no assurance that settlers will apply, and no obligation assumed by them. And the conclusion is deduced that the actual settlers clauses, viewed even as covenants, were either impossible of performance or repugnant to the grants, and, therefore, void.

The arrangement seems very formidable, but is it not entirely artificial? It is stipulated that prior to 1887 more than 163,000 acres of the granted lands were sold, nearly all of which were sold to actual settlers, in small quantities. If the sale of 163,000 acres of land encountered no obstacle in the enumerated uncertainties we cannot be impressed with their power to obstruct the sale of the balance of the lands. The demonstration of the example would seem to need no addition. But passing the example, as it may be contended to have some explanation in the character of the lands so disposed of, the deduction from the asserted uncertainties is met and overcome by the provisos and their explicit direction. They are, it is true, cast in language of limitation and prohibition; the sales are to be made only to certain persons and not exceeding a specified maximum in quantities and prices. If the language may be said not to impose "an affirmative obligation to people the country" it certainly imposes an obligation not to violate the limitations and prohibitions when sales were made, and it is the concession of one of the briefs that the obligation is enforceable, and that, even regarding the covenant as restrictive, the "jurisdiction of a court of equity, upon a breach or threatened breach of the covenant, to enforce performance by enjoining a viola-

tion of the covenant cannot be doubted." Apposite cases are cited to sustain the admission, and in answer to the contention of the Government that it could recover no damages for the breach and hence had no enforceable remedy but forfeiture, it is said: "But the jurisdiction of a court of equity in such cases does not depend upon the showing of damage. Indeed, the very fact that injury is of public character and such that no damage could be calculated, is an added reason for the intervention of equity." And cases are adduced. We concur in the reasoning and give it greater breadth in the case at bar than counsel do. They would confine it, or seem to do so, to the compulsion of sales of land susceptible of actual settlement, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken as they were given. Assent to them was required and made, and we cannot import a different measure of the requirement and the assent than the language of the act expresses. It is to be remembered the acts are laws as well as grants and must be given the exactness of laws.

If the provisos were ignorantly adopted as they are asserted to have been; if the actual conditions were unknown, as is asserted; if but little of the land was arable, most of it covered with timber and valuable only

for timber and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; if its character was given evidence by the application of the Timber & Stone Act to the reserved lands; if settlers neither crowded before nor crowded after the railroad, nor could do so; if the grants were not as valuable for sale or credit as they were supposed to have been and difficulties beset both uses, the remedy was obvious. Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it. Besides, we may say that there is controversy about all of the asserted facts and conclusions.

Our conclusions, then, on the contentions of the Government and the railroad company are that the provisos are not conditions subsequent; that they are covenants, and enforceable; and we pass to the other contentions of the company.

It is contended (1) that Congress was without lawful authority on April 10, 1869, to annex a new condition, by amendment or otherwise, to the grant made by the act of 1866 as amended by the act of June 25, 1868 (the latter extended the time to complete the first and subsequent sections of the road and the completion of the whole road). We do not think it is necessary to follow the involutions of the argument by which the contention is attempted to be supported. It is asserted that the California & Oregon Railroad Company filed its assent within one year and completed the first sec-

tion of twenty miles within two years after the passage of the act of July 25, 1866, and that the Oregon Central Railroad Company (East Side Company) was not in default on April 10, 1869. The assertions come very late. Had they been made at that early time, questions would have been presented whose solution we need not conjecture. The West Side Company preceded the East Side Company and on October 10, 1866, received the designation from the Oregon legislature as the road entitled to receive the grant of 1866. The East Side Company started its existence on April 22, 1867, and in 1868 attacked the legality of the incorporation of the other company and procured the revocation of the designation of that company and the designation of itself by the legislature. The controversy for precedence and rights continued. It was carried to Congress, and the act of April 10, 1869, was passed. Subsequently came compromises and the act of May 4, 1870. By the latter act and in acceptance of its grant and provisions, the West Side Company took the west side of the Willamette River. The East Side Company took the east side of the river and on June 8, 1869, by resolution, accepted the provisions of the act of 1866 "and of all acts amendatory thereof, and upon conditions therein specified, and do hereby give our assent and the assent of such company thereto." It was not then thought, as it is now asserted, that the act of 1869 annexed new and invalid conditions, nor was there such assertion afterwards. The East Side Company, on March 29, 1870, assigned its rights under the act of 1866 *and the acts amendatory thereof and supplemental thereto* to the present company, the Oregon & California Railroad

Company, and then dissolved. The Oregon & California Railroad Company, accepted the transfer and by resolution accepted the act of 1866 and amendments thereto and "all the benefits and emoluments therein and thereof granted, and upon the terms and conditions therein specified", and authorized the assent to be filed in the office of the Secretary of the Interior.

It is too late to declare such formal and repeated action to have been unnecessary. Every advantage was obtained, and while enjoying the benefit of it the obligations of it cannot be denied. Had there been an assertion of rights against the act of 1869 and had there been an immediate rejection of its provisions and obligations, the questions in the present case would not now be submitted for solution. It is possible to suppose that no patents to lands would have been issued, or at any rate the Government's attention would have been challenged to the assertion of rights which it might have contested from a position of supreme advantage.

(2) It is contended that if sales were made under the limitations of the provisos the breaches were acquiesced in, and for this the action and knowledge of the officers of the Government are adduced—indeed, the knowledge of Congress itself; and reciting what was done under the grants, counsel say: "It is a story of mortgages and sales, executory contracts and conveyances, and a stream of Government patents flowing in between. These things were known of all; they were matters of common knowledge, notoriety of public record; the railroad knew them; the people knew

them, the Government knew them." And cases are cited which, it is contended, establish that such circumstances might work an estoppel even against the Government, which, when it appears in court, it is contended, is bound like other suitors, and certainly establish that for more than forty years in the view of the executive officers the provisos were not conditions subsequent. Granting their strength in that regard, granting they have some strength in every regard, they have not controlling force, considering the provisos as simple covenants. And they cannot be asserted as an estoppel. No one was deceived, at least no one should have been deceived; no action was or should have been induced by them that could plead ignorance of the provisions and immunity from their responsibility. The recited conduct had explanation and notice in the opinions of the Department of the Interior. They are entirely consistent with the belief expressed by Mr. Ballinger, then Commissioner, afterwards Secretary of the Interior, that their enforcement was a matter for the courts, not for executive or legislative action.

Mr. Ballinger, in a communication to a member of the House of Representatives, expressed the view that "as soon as the title vested in the company (and it was his view that it had vested by the construction of the railroad), jurisdiction over the lands passed from the executive branch of the Government, and the enforcement of the provision (the sale of lands to actual settlers) rests with the courts, through appropriate action by either the settlers entitled to purchase or by the Government, acting through the Department of Justice."

And a doubt was expressed of the power of Congress to compel compliance with the provision. This was the position of the Department in 1907. It was not new or sudden. It was the repetition of the declaration of a much earlier time.

In an early day of the grant—1872—a communication was addressed by the then Attorney General to the Commissioner of the Land Office, accompanied by a letter from the president of the European & Oregon Land Company (this company was made a trustee of the lands granted under the acts of 1866 and 1869 to secure a bond issue of the company,) in which it was stated that the board of trustees of the company, in accordance with a legal opinion given to it, had ordered that persons who had become *actual settlers* between July 25, 1866, and April 10, 1869, should have the privilege of purchasing according to the proviso, “but as to *all others* the company was not legally restricted from selling on liberal terms, for cash or credit, at reasonable rates.” A request was made for an approval of the construction, and that the company be authorized “to sell on such terms as may be reasonable and just to all parties without any restrictions.” This letter was submitted to the then Secretary of the Interior, Mr. Delano, who replied “that the proviso *means just what it says*”, “‘that the lands be sold to actual settlers only’” in the designated quantities and for the designated prices; that the legislative intention was plainly to prevent the lands being held for speculative prices or disposed of to others than actual settlers, and that to construe the pro-

viso as requested would in his "judgment utterly defeat such intention."

It being objected that the case was not submitted for decision or opinion, the Secretary replied that it was so regarded and that the opinion could not be formally withdrawn. He, however, expressed his willingness at any time on application to reopen the case and to hear all arguments which the company might desire to present. The opportunity was never taken advantage of, but the company proceeded upon its own construction of the proviso.

These views explain the attitude of the Department and give different color and meaning to its action than those assigned to it by the railroad company, and if the company disagreed with or defied the Department it cannot claim to have been deceived. The views of the Department were no doubt the views of Congress, and its action and reluctance to prejudge are exhibited in the resolution of April 30, 1908, under which this suit was brought. It refused, as we have seen, to determine peremptorily the rights of the United States or to anticipate judicial action.

We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence and estoppel and even to the defenses of laches and the statute of limitations. The laws which are urged as giving such defenses

and as taking away or modifying the remedies under review have no application. It would extend this opinion too much to enter upon their discussion.

A word of comment may be made upon one of the acts adduced as constituting a waiver of the breaches of the covenants, that is, upon the act passed August 20, 1912, (c. 311, §7 Stat. 320), it being supplemental to the joint resolution of April 30, 1908, *supra*. It was passed after this suit was commenced and brought forward with the other acts by an amendment to the answer. Counsel assert of it substantially as alleged in the answer that it "is a recognition of the non-settlement character of the lands involved, and that such lands, at the time they were sold to the so-called innocent purchasers described in forty-five suits brought by the United States against said purchasers and these defendants in this court, are unfit for settlement and were so unfit for settlement and could not be sold to actual settlers at the time they were sold by the company to such purchasers."

We have answered the contention so far as it depends upon the character of the lands. The character of the lands furnished no excuse. It might have justified non-action, but it did not justify antagonistic action. Moreover the act, while it authorized compromises with purchasers from the company, explicitly excluded the application of the provision to lands in the present suit and declared that it should create no "rights or privileges whatever in favor of any of the defendants therein" and that nothing in the act should condone any

of the breaches of the conditions or provisions of the granting acts nor be a waiver of any cause of action or remedy of the United States on account of any such breach or breaches or of any right or remedy existing in favor of the United States.*

With the provisos as conditions subsequent out of the way the suit remains one to enforce a continuing covenant. It is not a suit to vacate and annul patents.

(3) There is a special contention, given the pretension of a separate brief, that the "Sinking Fund Act of Congress of May 7, 1878, ratified the transfer of the California & Oregon Railroad and its land in California to the Central Pacific Company, and operated to abrogate the 'Settlers Clause' contained in the acts of April 10, 1869, and May 4, 1870." The argument to support the contention is that the Central Pacific Railroad Company became, with the consent of Congress, the owner of the California & Oregon Railroad (to avoid confusion this company must be kept distinct from the defendant Oregon & California Railroad) in 1870, and that after such transfer and date it became impossible for the

* "Sec. 6. That nothing in this act contained, nor action taken pursuant to the provisions of this Act, shall be construed as a condonation of any of the breaches of any of the conditions or provisions annexed to any of the grants designated in said joint resolution approved April thirtieth, nineteen hundred and eight, nor as a waiver of any of said conditions or provisions, nor as a waiver of any right of forfeiture in favor of the United States on account of any breach or breaches of any of said conditions, nor as a waiver of any cause of action or remedy of the United States on account of any breach or breaches of any said conditions or provisions, nor as a waiver of any other rights or remedies existing in favor of the United States."

latter company to sell the lands for the prescribed price, or for any other price, or to settlers in any quantities, "for the reason that the company had parted with its title to the entire grant, and this was recognized, approved and validated by the United States." The contention seems to be directed more to the settlers' clause viewed as a condition subsequent than to it considered as a covenant. It is, however, said that the clause "has been entirely abrogated by said legislation and the acts of the Government." We are not impressed by the contention. It seems to be a tardy claim in the case and is the dare of an extreme ingenuity against the admissions and averments of the answers and many assertions which the record contains of ownership of and dominion over the lands by the Oregon and California Company and of their disposition by it. Indeed, it is opposed to the whole scheme of the suit and the defenses to it and to the stipulation of the parties. It there appears that after the designated date patents were applied for and issued to the Oregon & California Railroad Company, defendant herein, for 323,078.68 acres of land, over 163,000 acres of which were sold by that company to actual settlers. Indeed, all of the activities in the administration of the grants were those of the Oregon & California Railroad. It made contracts and executed deeds for particular parcels; it made trust deeds for the whole of them; it went into receivership and emerged from it to resume its activities, and made the reports to Congress upon which it bases the acquiescence of the Government in the breaches of the provisos.

It is true that there appears in the stipulation the confusion of a statement that there was an amalgama-

tion and consolidation of the Central Pacific, Western Pacific and Oregon Central Railroad Companies into the Central Pacific Company and that at the time the articles of amalgamation and consolidation were filed (June 23, 1870) the California & Oregon Railroad Company "was the owner of all unsold lands in California" granted by the act of July 25, 1866; that from the date of filing such articles of amalgamation and consolidation the Central Pacific Railroad Company remained owner of all of the lands granted by the act of 1866 and two other acts which made grants to the latter company until 1899, when what remained unsold of the lands were granted to the Central Pacific Railway. But it is stipulated that the statements "concerning the ownership and conveyance of the lands granted by said acts of Congress are made subject to the terms and provisions of said acts of Congress respectively, and all rights of the United States thereunder—the title to said lands not being an issue in the suit at bar." Why these facts were stipulated it is hard to guess, but it is certain they cannot be given effect against all other facts stipulated. It will be observed the stipulation is concerned only with the California & Oregon Railroad, not with the defendant Oregon & California Railroad. The explanation of the Government is, therefore, correct that the Oregon part of the grant was by the grant itself treated as substantially distinct from the California part and that the Oregon part has always been claimed, used and enjoyed by defendant, the Oregon & California Railroad Company or its predecessors in title, and never by the Central Pacific.

The provisos of the acts having been thus established as covenants, not conditions subsequent, between the Government and the defendants, and their continuing obligation determined, we are brought to the consideration of the rights of the cross complainants and interveners thereunder.

It may be said that in some of the aspects of our discussion there was implication against their contentions, but it also may be said there is implication for them. Undoubtedly the provisos expressed the policy of the settlement of the lands and a sale to settlers, but the cross complainants and interveners assert a right more definite—a trust, indeed, and personal—of compulsory obligation upon the railroad company, to be enforced in individual suits.

Snyder and 63 others, alleging themselves to be *actual* settlers upon specified lands, brought suits nearly a year before the present suit was commenced. They were brought into this suit and are now here as cross complainants. They pray that the grants be declared to be grants in trust and ask for protection, “whatever form of decree may be entered.” They further ask “that receivers or trustees be appointed, whose duty it shall be to formulate, with the approval of the District Court, suitable rules and regulations for the sale of all the lands here involved, in accordance with the acts of Congress making the grants.” They deny having anything in common with the interveners, and, as we have seen, vigorously attack the claim of the Government for a forfeiture of the grants.

The interveners concur with the cross complainants that the acts created a trust but assert that they have a broader extent. In other words, and as their counsel express it, the intention of Congress was to create a trust in the granted lands for the benefit of those who might desire to acquire title thereto, that is, not actual settlement was the condition of purchase, but an intention to settle, with the qualification to do so.

Here, then, is a conflict between the asserted beneficiaries of the asserted trust—whether *actual* settlers, as cross complainants contend, or *applicants* for settlement, as the interveners insist. The distinction would seem to be real and cannot be confounded. The word “actual” expresses a settlement completed, not simply contemplated or possible. Upon the express words of the provisos it would seem that interveners’ claims to be beneficiaries of the trust, if there is a trust, must be refuted.

The cross complainants present arguments of more difficulty, supported by appealing considerations. “Actual settlers” are the words of the provisos, and we may assume actual settlers were contemplated and sales of the lands were restricted to them; but how were actual settlers to be ascertained, and by whom? And was there a compulsion or option as to sales? There could not be an absolute right to settle or purchase unless there was an absolute compulsion to sell. The acts of Congress omit regulation. Their language is not directive; it is restrictive only. With this exception the grant is unqualified. The lands were granted

to aid in the construction of the road, and while it is a certain inference that disposition of them was contemplated, necessarily there was conferred a discretion as to time. There was certainly no limitation of it expressed.

The contending considerations we have already stated and their respective weights, and decision must necessarily turn upon a judgment of the purposes of the granting acts, and in what manner they were intended to be accomplished, not of the provisos alone. There is plausibility in the argument which represents that if the provisos be held to give to the railroad a discretion of sale, the choice of time and settlers, their requirement is impotent, and instead of securing settlement would prevent it; instead of devoting the lands to development, retain them in monopoly and a kind of mortmain.

We feel the strength of the argument but cannot yield to it. There are countervailing ones. We have already indicated that nothing can be deduced from the imperfections of the granting acts. Indeed, the argument of cross complainants, like a great many other contentions in the case get their plausibility from the abuses of the granting acts, not their uses. We have seen that in the early days of the grants settlements were normally made and the railroad, in the exercise of its discretion, responded to such settlement by sales to settlers.

There was no embarrassment then in the selection of settlers and no question by anybody that there was a discretion of sale on the part of the railroad company.

A denial came later and the assertion of a peremptory right against the company of settlement and purchase, both to be acquired by an intrusion upon the company's possession, if it can be said to have had possession. Of course, the delay in the assertion of a right is not conclusive against its existence. There is, however, argument in it, and if it may be said that settlers were not in such numbers and urgency as to bring their rights to attention and assertion, a conjecture may be engendered that some other purpose than the acquisition of homes has led to a denial of rights which no one theretofore had questioned. It is asserted that not a desire of settlement but the rise in the price of lumber has created an eager demand for the lands.

There are, however, further considerations. By the acts of 1866 and 1870 it is provided that upon the survey and location of the roads the Government shall withdraw from sale the granted lands, and the provision would seem to withdraw the lands from the specific operation of the land laws and certainly from a complete analogy to them. The public land laws had test of the qualification of settlers under them; they had also the machinery of proof and precaution. When the granted lands were withdrawn from those laws and primarily devoted to another purpose they were committed to another power, to be administered for such purpose, and a discretion in the exercise of the power, within the restriction imposed, was necessarily conferred. This purpose we have sufficiently estimated. Nor need we pause to consider the differences between charitable trusts and other trusts, the class, not individual interest, which the

former must have, as it is contended, and the certainty in the beneficiaries which the cases have assigned to the latter. And certainly the words "actual settlers" indicate no particular individuals. They describe a class or body of individuals without habitation or name. As Judge Wolverton, in his opinion in the District Court (186 Fed. Rep. 861, 910), said: "There could be no actual settler until an actual habitation was established upon some specific parcel of this land. Logically, no one is a *cestui que trust* under the theory until and unless he becomes such a settler. This is a palpable demonstration of the uncertainty as to the beneficiary, for who, of the vast concourse of humanity, is going to come and claim the right and privilege of settling upon the land?" We cannot construe the grants as confined or encumbered by rights so indefinite.

There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed, and we agree with the Government that the company "might choose the actual settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres." And we add, it might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed; and we say "restrictions imposed" to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos.

To use the grant for credit might become, indeed did become, a necessity. The construction of the road halted

for funds. They were raised by trust deeds, as we have seen. The accomplishment of the purpose of the grants determines, we repeat, against the creation of a trust.

In conclusion we cannot refrain from repeating that the case in its main principles is not in great compass. It has been given pretension and complexity by the happening of the unforeseen, the lapse of time, change of conditions and the contests of interests. These, however, are but accidents, giving perplexity and prolixity to discussion. Judgment is independent of them. It is determined by the simple words of the acts of Congress, not only regarded as grants but as laws and accepted as both; granting rights but imposing obligations—rights quite definite, obligations as much so. The first had the means of acquisition; the second, of performance; and, as we have pointed out, whatever the difficulties of performance, relief could have been applied for and, it might be, have been secured through an appeal to Congress. Certainly evasion of the laws or the defiance of them should not have been resorted to.

Nor can their obligation be magnified by looking backwards, by the results achieved rather than when they were only hoped for, by conditions of which there was not even prophecy.

We have seen that one company failed under the burdens which it assumed. The other company took it up and struggled for years under it and its own burden. It may, indeed, have finally succeeded by a disregard of the provisos. It might, however, have succeeded by a strict observance of them. We are not required to decide be-

tween the suppositions. We can only enforce the provisos as written, not relieve from them.

For the same reason we cannot at the instance of the Government give a greater sanction to them than Congress intended, nor give to cross complainants and interveners a right which the granting acts did not confer upon them.

Rejecting, then, the contention of the Government and the contentions of the cross complainants and interveners and regarding the settlers clauses as enforceable covenants, what shall be the judgment? A reversal of the decree of the District Court, of course, and clearly an injunction against further violations of the covenants. There certainly should be no repetition of them. What they were the record exhibits.

We need not comment on them or point out how opposed they were to the covenants, how antagonistic to the policy and purpose of the Government expressed in the covenants. The contrast of a sale to a single purchaser of 160 acres (the maximum amount) with a sale of 1000, 2000, 20,000 and 45,000 acres to a single purchaser needs no emphasis; nor the contrast of a use of the lands to establish homes with their use for immediate or speculative enterprises.

In view of such disregard of the covenants, and gain of illegal emolument, and in view of the Government's interest in the exact observance of them, it might seem that restriction upon the future conduct of the railroad company and its various agencies is imperfect relief; but the Government has not asked for more.

In its bill it has distinguished between the sold and unsold lands and between the respective rights and interest, vested, contingent or expectant, in them; and while it is asserted that all have become forfeited, only the unsold lands and the rights and interest in them are included in this suit. And the reason is given that the purchasers were many, the names and places of residence of only a few of them were known and the names of the others could not have been ascertained in time to make them parties to the suit. Besides, that such purchases and interests were made and acquired under greatly varying circumstances and that it would be inequitable to make a few purchasers representatives of all, and to make all parties would postpone and might ultimately defeat the public interests. That, therefore, this suit was brought, it is alleged, to determine the rights and remedies as to the unsold lands, and that subsequently other suits will be instituted as to the sold lands, rights and remedies as to them being in effect reserved.

Therefore, the decree in this suit shall be without prejudice to any other suits, rights or remedies which the Government may have by law or under the joint resolution of April 30, 1908, (Res. 18, 35 Stat. 571), or under the act of Congress passed August 20, 1912 (c, 311, 37 Stat. 320).

However, an injunction simply against future violation of the covenants, or, to put it another way, simply mandatory of their requirements, will not afford the measure of relief to which the facts of the case entitle the Government.

The Government alleged in its bill that more than 1000 persons had made application to purchase from the railroad company in conformity to the covenants. In answering the defendants averred that such applications were made by persons who desired to obtain title on account of the timber and not otherwise, and for the purpose of speculation only and not in good faith as actual settlers. And it was averred that the lands were chiefly and in most instances solely of value because of the timber thereon and were not fit for actual settlement. And, further, that the lands capable of actual settlement and the establishment of homes thereon at no time "exceeded (approximately) 300,000 acres, consisting of small and widely separated tracts, all of which were sold to actual settlers or persons claiming to be such during construction and prior to completion, respectively, of said railroads, in quantities of 160 acres or less to a single purchaser, at prices not exceeding \$2.50 per acre."

A great deal of testimony was introduced, consisting not only of that of witnesses but of maps, photographs, reports and publications, which tended to establish the asserted character of the lands. And there was evidence in rebuttal. We cannot pause to determine the relative probative force of the opposing testimonies. It is, however, clear, even from the Government's summary of the evidence, that lands which may be fit for cultivation have a greater value on account of the timber which is upon them. Besides, for our present purpose we may accept the assertion of defendants; and we have seen that Congress extended the Timber and Stone Act to the reserved lands, and, by the act of August 20, 1912, *supra*,

it has withdrawn from entry or the initiation of any right whatever under any of the public land laws of the United States the lands which might revert to the United States by reason of this suit.

This, then, being the situation resulting from conditions now existing, incident, it may be, to the prolonged disregard of the covenants by the railroad company, the lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the timber thereon and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.

If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its discretion may modify the decree accordingly.

Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion.

Mr. Justice McReynolds took no part in the *consideration* and decision of the case.

*In the District Court of the United States for the
District of Oregon, Ninth Circuit.*

No. 3340.

United States of America,

Complainant and Appellee.

v.

Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee,

Defendants and Appellants.

CERTIFICATE OF THE CLERK OF THE
UNITED STATES DISTRICT COURT TO
THE TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing printed pages, numbered from 1 to ~~165~~, inclusive, are a full, true, correct, and complete transcript of so much of the record, papers, and other proceedings in the above entitled suit as are, according to the praecipe of appellants and the stipulation of the parties herein, required and necessary for the hearing in the United States Circuit Court of Appeals, for the Ninth Circuit, on the appeal taken by defendants on January 8, 1916, from the judgment and decree entered in said District Court of the United States for the District of Oregon on the 9th day of December, 1915, in case num-

bered 3340, in equity, as the originals thereof appear of record and on file in said District Court at the city of Portland in said District; and that the same constitute the transcript of record on appeal herein from said decree of the District Court of the United States for the District of Oregon, entered on December 9, 1915, to the United States Circuit Court of Appeals for the Ninth Circuit.

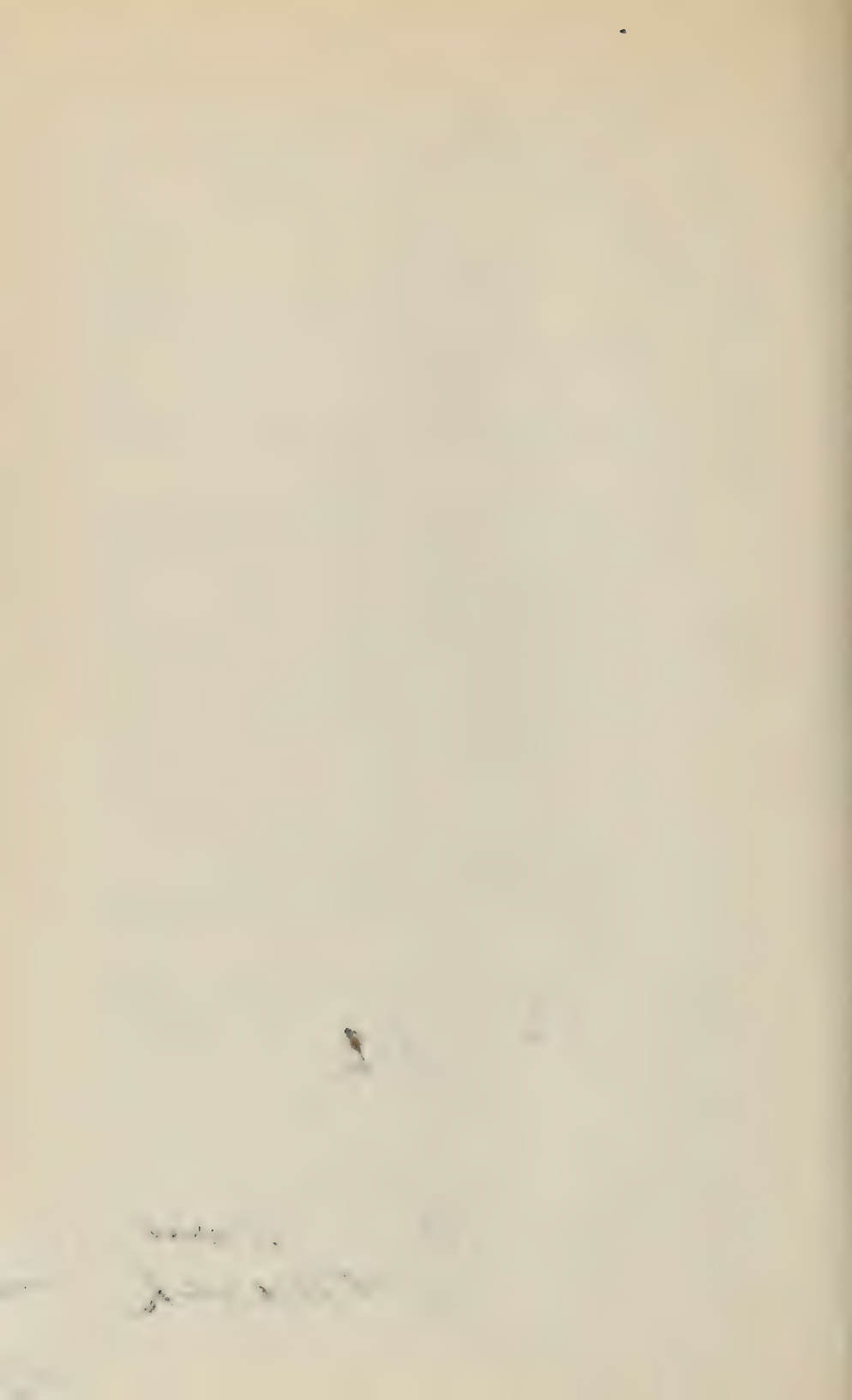
And I further certify that pursuant to the stipulation of the parties appearing in the foregoing record and the order of court based upon said stipulation, I have attached to the foregoing transcript a copy of the opinion of the Supreme Court of the United States upon certificate from and Writ of Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit, in this cause, and that said copy of opinion has been compared by me with the opinion of said Supreme Court as the same appears in Volume 238, page 393, of the United States Supreme Court Reports, and is a true and complete transcript of the said opinion as the same appears in said Reports.

And I further certify that the cost of the foregoing transcript is \$ ~~6.00~~ for clerk's fees for preparing the said transcript, and \$ ~~15.00~~ for printing said transcript, and that the same has been paid by said appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Portland, Oregon, this ~~1st~~ day of ~~March~~, 1916.

John A. Marsh
Clerk of the District Court of the United States for the District of Oregon.

(Seal)
LRS



No. 2754.

In the United States
Circuit Court of Appeals
for the Ninth Circuit

OREGON AND CALIFORNIA RAILROAD
COMPANY, SOUTHERN PACIFIC COMPANY,
ET AL.,

Defendants and Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR DEFENDANTS AND APPELLANTS,
OREGON AND CALIFORNIA RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY, AND STEPHEN T.
GAGE, INDIVIDUALLY AND AS TRUSTEE.

Upon Appeal from the District Court of the United States,
For the District of Oregon, from the Decree
Entered December 9, 1915.

WM. F. HERRIN,
P. F. DUNNE,
WM. D. FENTON,

Solicitors and Attorneys for Said Defendants
and Appellants.

FRANK C. CLEARY,
of Counsel.

Filed

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F. D. M. S. C. C.

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SUBJECT INDEX.

Assignment of Errors	7
Statement	1-6
The District Court Erred in Not Pursuing the Mandate of the Supreme Court	7-53
Costs Were Improperly Taxed Against the Appellants	53-58

TABLE OF CASES CITED.

Bissell v. Goshen, 72 Fed 545	32-32, 38
Burke v. S.P.RR.Co., 234 U.S. 679-80	36-37
Bybee v. Oregon & Cal. RR. Co., 139 U.S. 663, 674	37-38
Howe v. Lowell, 171 Mass. 582-3	49-51
Landers v. Landers, 151 Ky. 215-17	49-51
New Jersey Zinc & Iron Co. v. Morris Canal and Banking Co., 44 N.J.Eq. 403-4	43-44
Northern Trust Co. v. Snyder, 77 Fed. 818	56-57
Oregon & Cal. RR. Co. v. U. S., 238 U.S. 417-18	10
“ “ “ “ “ 421-2	11,39
“ “ “ “ “ 424-5	54-55
“ “ “ “ “ 428	13,23
“ “ “ “ “ 432-3	13-15, 39
“ “ “ “ “ 434-4	15, 23, 38
“ “ “ “ “ 436	8, 39
“ “ “ “ “ 437	9
“ “ “ “ “ 437-9	18
Reeves on Real Property, Section 423	41-42
Sanford Fork & Tool Co., Petitioner, 160 U.S. 247.....	32-33, 38
Street on Federal Equity Practice, Vol. 2 Sec. 2022	57
United States v. Loughrey, 172 U.S. 210	42
United States v. Tennessee etc. RR. Co. 176 U.S. 253	43

No. 2754.

In the United States
Circuit Court of Appeals
for the Ninth Circuit

OREGON AND CALIFORNIA RAILROAD
COMPANY, SOUTHERN PACIFIC COMPANY,
STEPHEN T. GAGE, Individually and as Trustee,
and UNION TRUST COMPANY, Individually
and as Trustee,

Defendants and Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR DEFENDANTS AND APPELLANTS,
OREGON AND CALIFORNIA RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY, AND STEPHEN T.
GAGE, INDIVIDUALLY AND AS TRUSTEE.

Upon Appeal from the District Court of the United States,
For the District of Oregon, from the Decree
Entered December 9, 1915.

STATEMENT.

The appeal here is from a decree of the District Court of Oregon, entered December 9, 1915. The decree was entered as a sequel and in assumed pursuance, of the mandate of the Supreme Court of the

United States, reversing a former decree of the District Court of Oregon, entered after trial on the merits. The short of it is, as appellants will contend, that the District Court of Oregon, in making the decree now appealed from, went beyond the mandate of the Supreme Court; decided and assumed to conclude matters in excess of the terms of the mandate; more specifically, undertook to impose an interpretation upon the rights of these appellants in respect to the timber on the land grant in question, not warranted, it is believed, by the terms of the mandate.

A land grant was made in 1862 to the Union Pacific and Central Pacific Railroads, in aid of the construction of a trans-continental railroad from the Missouri River to San Francisco Bay on the Pacific Ocean. The extension of that trans-continental railroad from some point in California, fixed at Roseville, near Sacramento, northward through California and Oregon to the City of Portland, was in the mind of Congress in 1866; and in that year a land grant was made in aid of the construction of such a railroad. So much of the land as lay within the State of Oregon, was granted to such company as should be designated by the Oregon Legislature, and upon that company was laid the burden of building the road from Portland south to the interstate line between Oregon and

California. The act of 1866 was amended in 1869, and in 1870 an additional act was passed granting land in aid of the construction of a railroad from Portland by way of Forest Grove to tidewater at Astoria on the Oregon Coast, and in a southerly direction to McMinnville, an Oregon point. The land embraced in the Act of 1866, as amended in 1869, and in the Act of 1870, is the Oregon land grant.

The act of 1866, as it was amended in 1869, provided,—and much the same provision, in terms, was in the act of 1870,—“that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser and for a price not exceeding \$2.50 per acre.” But the Acts of 1866 and 1869 and of 1870 were relatively slow in arriving. The Pre-emption Law of September 4, 1841, the Oregon Donation Act of September 27, 1850, and the Homestead Law of May 20, 1862, had gone before.

The valley lands, adaptable for settlement and falling within the primary limits of the railroad grant, had been taken up under these earlier statutes. The railroad company was put to it to find its lands within the indemnity limits of the grant,—not valley lands these, but in great part mountain

forests. Some land there was, susceptible of cultivation, not a great deal of it, and this the railroad company, in the earlier years of the grant, disposed of for settlement, as contemplated by the settler's clause of the granting act. Later, and when the timber began to take on value, the company made sales of the timbered land—for lumber was soon to become, as it did, the principal industry of the state,—and those sales, naturally, were in larger quantities than the small parcels of the settlers' clause, and at somewhat higher prices, and not to farmers but to lumbermen. These transactions, in departure from the literal requirements of the settlers' clause, were open and above board. They were the only practicable way of making the grant responsive to what the Supreme Court has held to be the primary purpose of the act, namely, to aid in the construction of a railroad; they were matters of common knowledge; they were matters of public record; they were known to the people of the state, to the courts of the state and of the nation, to the Land Department and the executive government and to both houses of Congress. They were reported with the utmost particularity of transaction, in respect to the location and quantity of the lands sold and the prices paid, to a bureau of the Land Department specially constituted for the purpose of receiving and acting on such information, and this information, in all its particularity, was transmitted to the Secretary of

the Interior, and by him to the President, and by the President to both houses of Congress, and was there referred to the appropriate committees and perpetuated as executive documents; and this information was so communicated and transmitted every six months during a period of some eight or ten years, and in pursuance of an act of Congress precisely calling for the information. Everything that was done by the railroad company in dealing with these lands, was in the light of day, and went on for over a generation, indeed for nearly forty years, without objection from the State of Oregon, without objection from the Land Department or the Executive government or Congress. If a railroad company was ever justified, or the stockholder who put his money into it, or the bondholder who loaned his money to it, in believing that a course of conduct had been ratified by general acquiescence, and a departure from the literal and exact language of a statute had been waived, the case at bar is a revealing instance.

Indeed, Congress, at no time, of its own initiative called into question the course of dealing with these lands by the company. It was a memorial of the Legislature of Oregon, procured by interested parties to be adopted in the year 1907, and complaining of the temporary withdrawal by the railroad company of these granted lands from sale,—upon the

ground, as stated in the bill, "of the great injury inflicted upon commercial and industrial conditions,"—that moved Congress to take action. The Attorney-General was authorized by joint resolution, to proceed against the company, and the suit in equity, now pending, and of which this appeal is a phase, then followed.

It will be recalled that an appeal was taken by the company to this court from the decree of the District Court of Oregon, forfeiting the title of the company to the granted lands, as for a breach of the settlers' clause, construed in that court to be a condition subsequent. Upon a certificate of questions from this court to the Supreme Court, the whole record was ordered up and the case was considered and decided at large. The Supreme Court determined that the settlers' clause was not a condition subsequent, that it was a covenant only, enforceable by injunction. The decree of the District Court of Oregon was reversed, and the cause was remanded to that court for further proceedings in accordance with the opinion of the Supreme Court. It is the decree entered by the District Court in such further proceedings, that the pending appeal now brings in question, and for the reason, as it is submitted, that the decree is not in accordance with the opinion of the Supreme Court.

ASSIGNMENT OF ERRORS.

The assignment of errors on the part of the Oregon and California Railroad Company will be found at pages 28-38 of the transcript of the record in this cause; on the part of the Southern Pacific Company, at pages 39-49; on the part of Stephen T. Gage, individually and as trustee, at pages 49-59; and on the part of the Union Trust Company, individually and as trustee, at pages 60-70. The assignments of error for these four appellants are, it will be readily understood, substantially identical. It would serve no use or purpose to repeat these assignments at this point, in view of the argument which follows, and in which they are gathered up. It will be necessary, we venture to think, to say that they all turn, with more or less particularity and variation of form and expression, on the fundamental contention that the District Court erred in not pursuing the mandate of the Supreme Court of the United States. The lower court, it may be added, adjudged costs against these appellants, and to its action in that regard error is assigned.

THE DISTRICT COURT ERRED IN NOT PURSUING THE MANDATE OF THE SUPREME COURT OF THE UNITED STATES.

The contention of the government that the settlers' clause was a condition subsequent, entailing a forfeiture for its breach, was rejected by the

Supreme Court. The cross-complainants, alleging themselves to be "actual" settlers upon the land, and the interveners, alleging themselves to be "constructive" settlers upon the land, made the contention that they had rights in the land as beneficiaries of a trust which the railroad company, as trustee, should be constrained to execute,—that contention was rejected. The settlers' provisos were held to be covenants, enforceable by an injunction against future violations of the same. We give the words of the opinion, 238 U. S., at page 436: "Rejecting, then, the contention of the government, and the contentions of the cross-complainants and interveners, and regarding the settlers' clauses as enforceable covenants, what shall be the judgment? A reversal of the decree of the District Court, of course; and clearly an *injunction* against *further* violations of the covenants."

That the injunction contemplated was in the nature of a restriction upon the *future* conduct of the railroad company, is again brought out at the same page of the opinion. The court is referring to the disregard of the covenants, to the gains received by the company in excess of the legal or statutory price as fixed by the settlers' clause, and it goes on to say: "In view of such disregard of the covenants and gain of illegal emolument, and in view of the government's interest in the exact ob-

servance of them, it might seem that *restriction* upon the *future* conduct of the railroad company and its various agencies is imperfect relief; but the government has not asked for more."

And again, at page 437 of the opinion, the court says: "However, an injunction simply against *future* violations of the covenants, or to put it another way, simply mandatory of *their requirements*, will not afford the measure of relief to which the facts of the case entitle the government."

It is not to be assumed, however, for a moment, that the court, in holding the provisos to be covenants enforceable by injunction and that an injunction should go against future violations of them, decided, or meant to decide, that these covenants were directive to the grantee or imposed any obligation upon it to make sales of the lands or were other than restrictive in character—restrictive, in the sense that if the railroad company exercised its option to make sales of the granted land it was restricted in such sales, so far as purchasers were concerned, to actual settlers; so far as quantities were concerned, to a maximum of 160 acres to each purchaser; and so far as price was concerned, to a maximum of \$2.50 an acre. An injunction, enforcing the covenants to the extent and by the measure of these restrictions, was the injunction which the court had in mind.

To illustrate: The court, at pages 417-418 of the opinion, is meeting the argument of the government that the railroad company has made a breach of the provisos and was amenable to a forfeiture. "In its argument at bar," says the court, "the government insisted that it was the duty of the railroad company to have provided the machinery for settlement, and, by *optional* sales, guarded by probational occupation of the lands, to demonstrate not only initial, but the continued, good faith of settlers; and that the omission to do so was of itself a breach of the provisos, and incurred a forfeiture of the grants. But when" the court continues, "did such obligation attach? Before or after the construction of the road—construction in sections, or completely? The contention encounters *the government's admission that there was no obligation imposed upon the railroad to sell*. And we have the curious situation—which is made something of by cross-complainants and interveners in opposition to the government's contention,—of the right of settlers to buy, *but no obligation on the railroad to sell*, and yet a duty of providing for sales under an extreme and drastic penalty. We may repeat the question, Might not such consequences have ended the enterprise, making it and its great purpose subordinate to local settlement? Indeed, might not both have been defeated by the inversion of their purposes."

The court rejects, as well, an argument made for the grantee that the covenants, expressed by the provisos, were not enforceable because of their lack of certainty, repugnancy to the grant, and impossibility of performance. The court saw, in the sales made in earlier years to settlers of some hundred and sixty-three thousand acres of the granted land, a demonstration of the certainty and practicability of the provisos; and it went on to show that, while these provisos imposed no affirmative duty upon the railroad company to make sales, yet when sales were in point of fact made, it was the duty of the railroad company to make those sales within the limitations and prohibitions of the covenant. After referring to the example of these early sales to settlers, the court says, at pages 421-2 of the opinion, "The demonstration of the example would seem to need no addition. But passing the example, as it may be contended to have some explanation in the character of the lands so disposed of, the deduction from the asserted uncertainties is met and overcome by the provisos and their explicit direction. They are, it is true, cast *in language of limitation and prohibition*; the sales are to be made *only* to certain persons and *not exceeding* a specified maximum in quantities and prices. If the language may be said *not to impose* 'an *affirmative* obligation to people the country' it certainly imposes an obligation not to violate the limitations and prohibitions *when*

sales were made; and it is the concession of one of the briefs that the obligation is ~~unenforceable~~, and that, even regarding the covenant as restrictive, the 'jurisdiction of a court of equity upon a breach or threatened breach of the covenant, to enforce performance by enjoining a violation of the covenant cannot be doubted.' Apposite cases are cited to sustain the admission, and in answer to the *contention of the government that it could recover no damages for the breach* and hence had no enforceable remedy but forfeiture, it is said: 'But the jurisdiction of a court of equity in such cases does not depend upon the showing of damage. Indeed, the very fact that injury is of public character and such that no damage could be calculated is an added reason for the intervention of equity.' And cases are adduced."

The opinion now proceeds: "We concur in the reasoning, and give it greater breadth in the case at bar than counsel do. They would confine it, or seem to do so, to the *compulsion of sales* of land susceptible of actual settlement, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an

attempt is manifest. The grants must be taken *as they were given*. Assent to them was required and made, and we cannot import *a different measure* of the requirement and the assent *than the language of the act expresses*. It is to be remembered that the acts are laws as well as grants and must be given the exactness of laws."

Again, at page 428, the court says: "The character of the lands furnished no excuse. *It might have justified non-action*, but it did not justify antagonistic action."

Again, at page 432, the court can see no merit in the claim of the interveners, who were mere constructive or potential settlers, under a statute dealing with actual settlers. "The word 'actual,'" the court says "expresses a settlement completed, not simply contemplated or possible. Upon the express words of the provisos, it would seem that interveners' claims to be beneficiaries of the trust, if there is a trust, must be refuted." But as to the cross-complainants, alleging themselves to be actual settlers, the argument, under a statute dealing with actual settlers *eo nomine*, is more difficult and the considerations are more appealing and this leads the court to re-affirm its interpretation that these provisos are restrictive merely, not directive.

Said the court (p. 432): "The cross-complainants present arguments of more difficulty, supported by appealing considerations. 'Actual settlers' are the words of the provisos, and we may assume actual settlers were contemplated, and sales of the lands were *restricted* to them; but how were actual settlers to be ascertained and by whom? And was there a *compulsion or option* as to sales? There could not be an absolute right to settle or purchase *unless there was an absolute compulsion to sell*. The acts of Congress omit regulation. *Their language is not directive; it is restrictive only*. With this exception, the grant is unqualified." But the court says further (pp. 432-3): "There is plausibility in the argument which represents that if the provisos be held to give to the railroad *a discretion of sale, the choice of time and settlers*, their requirement is impotent, and instead of securing settlement would prevent it; instead of devoting the lands to development, retain them in monopoly and a kind of mortmain."

"We feel the strength of the argument but cannot yield to it. There are countervailing ones. We have already indicated that *nothing can be deduced from the imperfections of the granting acts*. Indeed, the argument of cross-complainants, like a great many other contentions in the case get their plausibility from the abuses of the granting acts, not their uses. We have seen that in the early days of the grants,

settlements were normally made and the railroad, *in the exercise of its discretion*, responded to such settlement by sales to settlers."

Again, pointing to the withdrawal of the granted lands from the operation of the public land laws and to the resulting differentiations, the court says (p. 434): "The public land laws had tests of the qualification of settlers under them; they had also the machinery of proof and precaution. When the granted lands were withdrawn from those laws and primarily devoted to another purpose, they were committed to another power, to be administered for such purpose, *and a discretion in the exercise of the power*, within the restriction imposed, was necessarily conferred."

And finally, at pages 434-5 of the opinion, the court says: "There was a complete and absolute grant to the railroad company with power to sell, *limited only as prescribed*, and we agree with the government that the company 'might choose the actual settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres.' And we add, it might choose the time for selling, or its use of the grants as a means of credit, subject ultimately to the restrictions imposed; and we say 'restrictions imposed,' to reject the contention of the railroad company that an implication of the power

to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos."

It is abundantly clear from the decision of the Supreme Court, that the language of these provisos "is not directive, it is restrictive only;" and that the obligation imposed upon the company is "an obligation not to violate the limitations and prohibitions when sales were made." The absolute grant to the railroad company carried the "power to sell, *limited only as prescribed.*" The company, as the government itself argued, and as the court agreed, "might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres;" and more than that, as the court explicitly held, "it might choose the time for selling."

There can be no misunderstanding of the position of the court, as to whether there was "a compulsion or option as to the sales."

An injunction, therefore, "against *future* violations of the covenants," as decreed by the court, once the covenants, as construed by the court, are understood, is not difficult to appreciate. It does not import or imply a direction to the company to make

sales, for the covenants were not directive. It does import a restriction upon the company, for the covenants were restrictive—subject to a restriction, “when sales were made,” made not under “compulsion” but at the “option” and in the “discretion” of the railroad company, that such sales should not violate the limitations and prohibitions of the provisos—that they should not be made except to actual settlers, that they should not be made in quantities to exceed 160 acres, and that they should not be made at prices in excess of \$2.50 an acre. A decree for such an injunction, would be a decree in accordance with the opinion of the court.

One thing, however, was quite clear to the court—that the settlers’ clause was a settlement clause, that it was not passed for the benefit of timber speculators; and that the government was entitled to some measure of relief, conservative of the policy of the act. The restriction on the railroad company, in making sales of forest land insusceptible of settlement, but highly valuable for timber, to a maximum price of \$2.50 an acre, would be virtually an invitation to the timber speculator, under the guise of a settler; the railroad company would be limited to that constituency for its purchasers; and the Congressional policy and intent would be defeated. Some measure of relief the government was entitled to, appropriate to that situation, and the court

seemed to think that the easiest way out of the difficulty was to refer the matter to Congress for some amendatory legislation.

The court makes no suggestion as to the character of this amendatory legislation, except that it is careful to say that any action by Congress in the premises must "secure to the defendants *all the value* the granting acts conferred upon the railroads." It will be convenient and aidful to quote the language of the opinion touching this measure of relief to which the government is entitled, over and above the injunction against future violations of the covenants. At pages 437-9 of the opinion, the court says:

"The Government alleged in its bill that more than 1000 persons had made application to purchase from the railroad company in conformity to the covenants. In answering the defendants averred that such applications were made by persons who desired to obtain title *on account of the timber* and not otherwise, and *for the purpose of speculation only* and not in good faith as actual settlers. And it was averred that the lands were chiefly and in most instances solely of value because of the timber thereon and were not fit for actual settlement. And, further, that the lands capable of actual settlement and the establishment of homes thereon at no time 'exceeded (approximately) 300,000 acres, consisting of small and widely separated tracts, all of

which were sold to actual settlers or persons claiming to be such during construction and prior to completion, respectively, of said railroads, in quantities of 160 acres or less to a single purchaser, at prices not exceeding \$2.50 per acre.'

"A great deal of testimony was introduced, consisting not only of that of witnesses but of maps, photographs, reports and publications, which tended to establish the asserted character of the lands. And there was evidence in rebuttal. We cannot pause to determine the relative probative force of the opposing testimonies. It is, however, clear, *even from the Government's summary of the evidence*, that lands which may be fit for cultivation have a greater value on account of the timber which is upon them. Besides, *for our present purpose* we may accept the assertion of defendants; and we have seen that Congress extended the *Timber and Stone Act to the reserved lands*, and, by the act of August 20, 1912, *supra*, it has *withdrawn from entry or the initiation of any right whatever under any of the public land laws of the United States the lands which might revert to the United States by reason of this suit*.

"This, then, being the situation resulting from conditions now existing, incident, it may be, to the prolonged disregard of the covenants by the railroad company, *the lands invite now more to speculation than to settlement*, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the

covenants, but enjoined from *any disposition* of them whatever *or* of the timber thereon and from cutting or authorizing the cutting or removal of any of the timber thereon, *until* Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances *and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.*

If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its discretion may modify the decree accordingly.

Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion."

It will be seen, therefore, that the opinion of the Court contemplates as well a secondary and temporary injunction as a general and permanent injunction. The general and permanent injunction is against future violations of the covenants as we now know those covenants to be, in their scope and effect, as understood by the court. The secondary and temporary injunction it is, and that only, which has reference to the timber. Its obvious purpose is

to maintain the *status quo*, so far as these lands and the timber upon them are concerned, for a limited period, until some adjustment, remediable of the anomaly that valuable timber lands should be salable at \$2.50 an acre, can be accomplished. Whatever adjustment may be made, it must be consistent with the vested rights of the railroad company. No legislation by Congress providing for the disposition of these lands by their owner, the railroad company, is within the mind of the court, except such as is consistent with the vested rights of the railroad company—such as shall “secure to the defendants all the value the granting acts conferred upon the railroads.” It is not contemplated, it could not have been, that Congress should provide for a disposition of those lands by Congress itself, or by anybody else who did not own the lands. The effort of the government in this litigation to disestablish the ownership of the railroad company, to enforce a forfeiture, to revest the title in the United States has failed. That contention had been definitely rejected. The railroad ownership had been vindicated and confirmed over and over again, but the owner of those lands, the railroad company, in essaying to make any disposition of these lands, was hedged in by the terms of a restrictive covenant, enforceable by injunction—was limited, in the disposition of these lands, to sales to actual settlers, in small parcels at a price of \$2.50 an acre. The condition of the

subject matter of the covenant—its physical and its economic condition—was inconsistent with such a covenant, the land was timber land, it was not settlement land, it was insusceptible of settlement, and its value was over and away in excess of \$2.50 an acre. Some relief from this impracticable covenant—some feasible and equitable relaxation of its strictness in the way of an amendment and expansion of the power of disposition conferred upon the railroad company—this was the real problem as the court saw it, and this is made apparent if we turn again to the opinion itself.

If these covenants were unworkable, the course of the railroad company, as the court saw it, was not to ignore or disregard them—they were a contract and a law. The true course was to go to Congress for some amendatory legislation in the way of relief from their requirements. The judgment of the court on the grant and on these covenants, it was said, was not to be determined by suggestions *ab inconvenienti*; “It is determined,” we give the language of the opinion “by the simple words of the acts of Congress, not only regarded as grants but as laws, and accepted as both; granting rights but imposing obligations—rights quite definite, obligations as much so. The first had the means of acquisition; the second, of performance; and, as we have pointed out, *whatever the difficulties of perform-*

ance, relief could have been applied for, and, it might be, have been secured through an appeal to Congress. Certainly, evasion of the laws or the defiance of them should not be resorted to." And taking these covenants as it found them, the court was not willing to enlarge their obligation by the wisdom that comes after the event. "Nor can their obligation," said the court, "be magnified by looking backwards, by the results achieved rather than when they were only hoped for—by conditions of which there was not even prophecy." (Opinion p. 435).

Again, the court has said, at page 428: "The character of the lands furnished no excuse; it might have justified non-action, but it did not justify antagonistic action." And more at large, and instructively, the court says, (pp. 422-3): "If the provisos were ignorantly adopted as they are asserted to have been; if the actual conditions were unknown as is asserted; if but little of the land was arable, most of it covered with timber and valuable only for timber and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; if its character was given evidence by the application of the Timber & Stone Act to the reserved lands; if settlers neither crowded before nor crowded after the railroad, nor could do so; if the grants were not as valuable for

sale or credit as they were supposed to have been, and difficulties beset both uses, *the remedy was obvious*. Granting the obstacles and infirmities, *they were but promptings and reasons for an appeal to Congress to relax the law*; they were neither cause nor justification for violating it." A decree, then, in accordance with the opinion of the Supreme Court would be injunctive in character, and of a two-fold aspect. It would, in the first place, enjoin the railroad company, generally and permanently, from future violations of these restrictive covenants. It would, in the second place, and as a suspensive measure, hold the lands *in statu quo* for a limited period until some relief from the strictness of disposition required by covenants, when seen to be inapposite to the subject matter, can be afforded by Congress. This secondary and suspensive injunction puts the sales of the land, although made in full conformity with the provisos, and as well the use of the timber by the company, in precisely the same category. Notwithstanding that the railroad company might seek to dispose of 160 acres of this land, during the period of the suspensive injunction, to an actual settler, at \$2.50 an acre—pursuing literally the terms of the proviso—it is enjoined *ad interim* from doing so; and it is likewise enjoined, during the interim from using the timber. The company's clear right to sell these lands, if it so elects, in conformity with the provisos, was a thing

conceded of everybody—it goes without saying. But that clear right is put in abeyance by the temporary injunction; and similarly, the equally clear right of the owner of the land to the timber growing upon it, is put in abeyance for the same period and in the same way. No question has been made in this case, whether in printed briefs or in oral discussion at bar, as to the right of an owner by absolute grant to the use of the timber on his land. No such question was decided in the opinion of the court; no such question was stated or considered or discussed in that opinion. What the lower court was directed to do, was to enter an injunctive decree, restraining the railroad company from future violations of the covenants, as those covenants had been construed by the Supreme Court, and, further, by secondary and temporary injunction, to preserve the *status quo* in respect to the lands and the timber until Congress could interpose with some relief by amendatory legislation, consistent with the vested rights of the owner of the grant.

The District Court, it is to be said with great deference, was not content to pursue the mandate of the Supreme Court. Its decree was in excess of that mandate. It was what this court has termed an “intermeddling” with matters outside the scope of the mandate. It proceeded to determine that the railroad company had no right to use the timber

upon its own lands while they were still unsold and in its possession and occupancy; it determined that the railroad company could not even make a clearing in anticipation of a sale to some settler; and it adjudged that the owner of the land could make no disposition of the timber except to sell it, when it sold the land to a settler at \$2.50 an acre. Two decrees were presented to the District Court—the one, by the government, imposing these new and added features upon the mandate of the Supreme Court, and this proposed decree, with an omission not material here, was adopted by the District Court: the other, by these appellants, pursuing the very terms of the mandate. These decrees are set forth in the transcript of the record. The decree as signed by the District Judge will be found at pages 93-6 of the transcript. The decree as proposed by these appellants will be found at pages 91-3 of the transcript.

We should now look at these decrees. The first paragraph is the same in both decrees. It provides that the original decree of the District Court, being the decree of forfeiture, “so far as it affects the defendants,” naming the appellants, “be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the ‘cross-complainants,’ and the ‘interveners’.” The second paragraph of the decree proposed by these appel-

lants, expresses the general injunction, ordered by the Supreme Court, against future violations by the railroad company of the covenants. It is in these words: (Tr. p. 92), "that the said defendants and their respective officers and agents be, and each is hereby enjoined, *from selling the lands*, or any part thereof, granted either by the act of Congress approved July 25, 1866, as amended by the act of Congress of April 10, 1869, or by the act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, *to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two and 50/100 dollars (\$2.50) per acre.*"

The second paragraph of the decree, as signed by the District Judge, so far forth as its first clause, is—barring the fact that the words "on the land sold to him" have been inserted therein after the words "actual settler"—the same, word for word, as the paragraph of our proposed decree which has just been quoted. But the government added, and the District Court adopted, a second and further clause, touching the timber on the granted lands—likewise any mineral found thereon—and, as part, not of any temporary injunction, but of the general and permanent injunction, enjoining the owner of the land from any disposition of the timber, or for the matter

of that, of any mineral deposits therein, except as that timber or those deposits went along with the land when it was sold within the limitations of the covenants, as indicated in the first clause. We quote this second, interpolated clause: (Tr. p. 94), "and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the lands on which the timber stands or in which the mineral or other deposits are found, and from cutting or removing or authorizing the cutting or removal of any of the timber thereon, or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits." This decree, it will be seen, imports bodily into the general injunction, a provision more or less reflective of the temporary restraint which the mandate imposes in aid of the maintenance of the *status quo* pending Congressional interposition. It is a gratuitous enlargement and exceeding of the terms of the mandate.

Paragraph 3 of our proposed decree, (Tr. pp. 92-3), pursues in terms the mandate of the Supreme Court, touching the temporary injunction. We quote paragraph 3:

"That the said defendants and their respective officers and agents be, and each is hereby,

enjoined from any disposition of the said lands, or any part thereof, or of the timber thereon, and from cutting, or authorizing the cutting, or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands, in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

This paragraph of our proposed decree will bear comparison, word for word, with the language of the opinion of the Supreme Court.

Paragraph 3 of the decree as signed by the District Court (Tr. pp. 94-5), like our paragraph 3, is meant to express the temporary injunction. We understand it to mean the same thing as our proposed paragraph 3, and we note these differences: that the decree as signed takes in, as well mineral or other deposits in the lands, as the timber thereon—although the opinion of the court will be searched in vain for anything concerning minerals; and in-

cludes, also, moneys which have arisen, or may hereafter arise from sales of the lands or of the timber, or through condemnation proceedings or otherwise, and when impounded, or which may hereafter be impounded, *in custodia legis* to await the final decision of the Supreme Court. No reference to such moneys was made in our proposed decree for the reason that such impounded moneys were covered by appropriate orders in the particular litigation.

Paragraph 4 of the decree as signed is a mere continuation of the subject matter of paragraph 3, and deals with the right of defendants to apply for a modification of the injunction in the event that Congress should fail to act. (Tr. p. 95).

Paragraph 5 of the decree as signed includes, as part of the lands covered by the decree, such lands as have reverted or may hereafter revert to the defendants—looking more to such lands as may be embraced by executory contracts of sale on which the purchaser has suffered or may suffer default. (Tr. p. 96).

And paragraph 6 makes the decree to be without prejudice to any rights of the government under the joint resolution of Congress, of April 30, 1908, being the resolution authorizing the Attorney-General to proceed against the granted lands; or under the Act of Congress of August 20, 1912, being the

statute authorizing the compromise of suits against purchasers from the railroad company. This need not detain us.

The seventh paragraph of the decree as signed awards costs against the appellants and in favor of the complainant to the amount of \$6,249.02; and we shall consider these costs later.

So far, then, as the timber is concerned, the difference between the two decrees—between the one as proposed by us and the one signed—will be found in the new and added features in excess of the language of the mandate, imported by the decree into the second clause of the second paragraph—by which the defendants are enjoined not only from selling the lands, not only from future violations of the covenants, but also—and for convenience we quote again :

“from selling any of the timber on said lands, or any mineral or other deposits therein except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon, or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.”

Mr. Justice Lurton of the Supreme Court of the United States, was a member of the Circuit Court of Appeals which decided the case of *Bissell v. Goshen*, 72 Fed. 545. Judge Lurton, himself, wrote the opinion in that case, and the court, speaking through him, said (at p. 548):

“Whatever was before it (speaking of the Appellate Court) by virtue of that appeal, and was disposed of, has been finally done, and must be regarded as settled. The Circuit Court is bound by such decree *as the law of the case*, and must carry it into execution *according to the mandate*. The decree of this court upon any matter within its jurisdiction *can neither be modified, reversed, enlarged, nor suspended* by the Circuit Court nor can any other or less or greater relief be accorded *than that prescribed by its decree and mandate*.

Judge Lurton goes on to quote “the very pertinent summary of the doctrine by Justice Gray” in the case of *Sanford Fork & Tool Company, Petitioner*, 160 U. S. p. 247, as follows:

“When a case has once been decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree *as the law of the case*, and must carry it into execution, *according to the mandate*. That court cannot vary it, or examine it for any other

purpose *than execution*, or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded. *Sibbald v. U. S.*, 12 Pet. 488, 492; *Railway Co. v. Anderson*, 149 U. S. 237, 13 Sup. Ct. 843. If the Circuit Court mistakes or construes the decrees of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount), or by writ of mandamus to execute the mandate of this court."

And further, at page 552, Judge Lurton says:

"It seems to us that the opinions and decrees of this, as a court of appellate jurisdiction, are final and conclusive upon every point actually decided, and that *it is the clear duty* of the lower court to give effect to the decree *without modification or enlargement, in the very terms of the decree here rendered.*"

No question of the right of the grantee of these lands, by an absolute grant qualified only by the provisos, to use the timber upon its unalienated land, or to take the coal from it or the iron that might be found below the surface, was, as we have already ventured to insist, involved or raised or argued or considered or presented. That issue was not before the court, and it is not determinable as an

academic thesis or otherwise than in some concrete case properly calling for its determination. Nevertheless, gratuitously, and in excess of the mandate of the Supreme Court, the decree, as proposed by the government and adopted by the District Court, assumes or attempts to foreclose these appellants in the premises. If there is anything in the opinion of the Supreme Court remotely hinting at a solution, it is to be found in the assignment by that court, in providing a temporary injunction, of our right to the timber and our unquestioned right to make sales of these lands to settlers in statutory quantities and at statutory prices to precisely the same category. Both rights are associated in immediate juxtaposition, and both rights are suspended pending the interval of contemplated Congressional policy, and both rights are assumed to be open to revival in the event of inaction by Congress.

It is true that the Supreme Court refused to forfeit this grant. It is true that the Supreme Court retained the title to these lands where the grant had put it—in the railroad company—but the thought seems to be that the failure of the government to achieve a forfeiture may be repaired by the action of Congress, and that, in some mysterious way, an appellate jurisdiction may be exercised by the legislature to review the judgment of the Supreme Court and to declare a forfeiture where the court had decided there could be no forfeiture. In

other words, it is the idea, as put forth by complainant in the argument at the bar of the District Court, and sought to be realized in the decree as signed, that Congress, by legislation, may revest itself with the title which it had granted to the railroad company and that, after all, the railroad company has a mere equity in a fund measured by \$2.50 an acre in the total acreage concerned, subject, again, to deduction by reason of any excess over \$2.50 an acre, which the railroad company may have received for some of these lands, and quite regardless of the administration expenses incurred by the railroad company in handling the grant, and regardless as well of the uncompensated services rendered and to be rendered by the railroad company through all the years in transporting government troops and materials, and regardless also of the fact that the railroad company kept its bargain with the government, and, by the construction of this road, earned the grant and received its patents accordingly. We are no longer, it would seem, the owners of this land by absolute grant, or at all; but by a novel species of equitable conversion the land is now revested, or by amendatory legislation is to be revested, in Congress, and we are to be transformed into beneficiaries of a sadly depleted fund.

We venture to think, however, that we are the owners of this land, by right, and as of absolute grant, qualified only by these provisos and by noth-

ing else, and that, as such owners, we are entitled to the timber upon our unalienated land, and entitled as well to take the coal or the iron, for example, that we may find below the surface.

The language of the Supreme Court of the United States in the recent case of *Burke vs. Southern Pacific R. R. Co.*, 234 U. S., at pages 679-680, is wholesome reading at this point:

“We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the government and the public, and to that end, provision was made for compensating the company if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the pro-

posal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti v. Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it into operation, the company performed its part of the contract, it became entitled to the performance by the government. In other words, it earned the right to the lands described. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the government, but the grant should not be treated as a mere gift."

This very act of 1866 was before the Supreme Court in *Bybee against Oregon & California Railroad Company*, 139 U. S. 663, 674. The court had no difficulty at that time in perceiving that this grant was like any other railroad land grant; that it was a grant of real estate, not an assignment of personalty by way of an equity in some fund, and that it was a grant *in praesenti*. The court said:

"The act making the grant in aid of this road does not, in its words of conveyance, differ materially from a large number of similar acts passed by Congress in aid of the construction of roads in different parts of the West, which have been considered by this court as taking effect *in praesenti*, although the particular lands to which the grant is applicable remain to be selected and identified when the road is located.

and the map is filed with the Secretary of the Interior. *The act then operates as a grant of all odd numbered sections within the limits, except so far as they may have been in the meantime, 'granted, sold, reserved, occupied by homestead, settlers, pre-empted or otherwise disposed of.'*"

And what the Supreme Court did decide in the case at bar, and its decision is now "the law of the case (*Bissell v. Goshen*, 72 Fed. 545; *Sanford Fork & Tool Company, Petitioner*, 160 U. S. 247) was this:

At pages 434-5 of the opinion in the case at bar, it said:

"There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed, and we agree with the Government that the company 'might choose the actual settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.' And we add, it might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed; and we say 'restrictions imposed' to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos."

And again, at page 422: "The language of the grants and of the limitations upon them is general. *We cannot attach exceptions to it.* The evil of an attempt is manifest. The grants must be taken *as they were given.* Assent to them was required and made, and we cannot import a *different measure* of the requirement and the assent *than the language of the act expresses.* It is to be remembered, the acts are laws as well as grants, and must be given the exactness of laws."

Again, at page 436: "We can only enforce the provisos *as written*, not relieve from them."

At page 432, recalling now the language just quoted, that "there was a complete and absolute grant to the railroad company, with power to sell, *limited only as prescribed,*"—we quote from what the court says of these prescribed limitations or provisos: "Their language is not directive; it is restrictive only. *With this exception the grant is unqualified.*"

The provisos, therefore, and such is now the law of this case, must be taken as they are written; they are not directive, they are restrictive only; the statute must be administered with the exactness of a law; the grant is unqualified, except as limited by the terms of the provisos. The limitations there found extend only to the disposition by sale of the

land by the grantee; they do not affect the use and occupancy of the unalienated property, held in complete, absolute and unqualified grant. It cannot be questioned, we venture to think, that the grantee, would be within its rights in making leases of the land, and applying the rents upon the construction. Nor, we submit, can it be questioned that the grantee would be authorized to take stone from the land and use it to build a railroad bridge or a station house, or for the matter of that, to turn the stone into money and place the avails against construction debt. Nor do we think it could be questioned that the grantee could take iron from the granted land for use upon its railroad fixtures or structures, or could take coal from the land—if such minerals were found there—to burn in the furnaces of its locomotives or of its machine shops. If the grantee should farm a patch of arable area, and turn the farm products into money and use that money to help pay coupon interest on the bonded debt, it would be within its rights and within the measure of its estate—for that estate is “a complete and absolute grant to the railroad company with power to sell, limited only as prescribed.” If all this be true, there is no reason apparent to us upon the face and terms of the statute why the right of the grantee in a like way to make use of the timber upon the land, should be differentiated or disparaged.

It would be passing strange if the government should now maintain that the company has no right to the timber upon these lands because and although, for many years before coal was used as fuel, it used this timber without question; and the right to use that timber, whether to burn it as fuel, or to use it in the upkeep and maintenance of the railroad, is in the forefront of the act of Congress itself, for that act granted the lands "to secure safe and speedy transportation of mails, troops, munitions of war and public stores over the line of said railroad." There could be no such transportation begun or kept up without a railroad, a railroad constructed not only but also maintained, and without fuel for motive power. Would the use of that timber to help pay the construction debt be in contravention of the railroad policy of the act? Would the removal of that timber go in defeat of the settlement policy of the act? Would it not be primarily and directly in aid of such policy?—For it is obvious enough that without a clearing most of the land is unfit for settlement.

Ferens ligna in silva—but we beg to quote the apt language from Reeves on Real Property, Section 423, where, in speaking of the grantee of the fee simple estate, the author says:

"*Subject to any restrictions* under which he may have taken it, and subject also to the mandate of the maxim *sic utere tuo ut alienum non*

laedas, its owner when in possession may use it for any purpose and in any manner that he may choose; he may cut timber, open and work mines, cultivate the soil even to exhaustion, build or pull down houses, commit waste, or injure or destroy any part of it as he may please. Not only does he have the right to sell or otherwise dispose of it as a whole, but he may grant or convey out of it any inferior interests, such as estates for years, for life or in tail."

Even if the estate here had been upon a condition subsequent—if the contention had prevailed that the proviso was a condition subsequent,—it would still remain, as said by this court in *United States vs. Loughrey*, 172 U. S., p. 210:

"When the property is held on condition, all the attributes and incidents of absolute property belong to it until the condition is broken."

In the *Loughrey* case, speaking of the timber, this court said:

"Counsel are mistaken in supposing that the plaintiffs had an immediate right to the possession of this timber. They had no right to the possession of the land until Congress passed the act of March 2, 1889, forfeiting the grant. Up to that time the title was in the State, and until then the United States had no more right to enter and take possession than they would have had to take possession of the property of a private individual."

And in *United States v. Tennessee etc. Railroad*, 176 U. S. 253, opinion by Mr. Justice McKenna, this court said:

“The title passed to the State, it was decided, continued in the State with all its attributes and power, except as expressly limited, until it should be resumed by the grantor by appropriate proceedings for breach of conditions. Hence the *logs* in that case, *though cut upon land* to aid a railroad which had not been constructed, and after the time designated for its construction, and after which all unsold lands should revert to the State, *was held to belong to the State*. And in the Courtwright case upon the same principles it was held that lands sold by the railroad without constructing the road carried title to the vendee. There was a reassertion and an application of the same principles in *United States vs. Loughrey*, 172 U. S. 206.

“It follows that by the act of June 3, 1856, the State of Alabama took the title to the lands in controversy upon conditions subsequent, and conveyed such title upon the same conditions to the Coosa Railroad; and that it continued in the railroad until determined by proceedings, legislative or judicial, for such forfeiture, and until such determination, all the rights and powers conferred by the act continued and could be exercised.”

In the New Jersey case of *New Jersey Zinc and Iron Co. v. Morris Canal and Banking Co.*, 44 N.J. Eq., pp. 403-4, this apt language is used:

“The difference in the legal effect which must be attributed to the conveyance of an estate in fee, whether absolute or qualified, and the right which the defendants acquired by simply taking possession of land for a right of way, or condemning it for a like purpose, is wide and vital. Under a conveyance, even if it be of only a qualified fee, the defendants have, while their estate continues, by the plain terms of their grant, an absolute right to the exclusive possession of the land conveyed, and any attempt by their grantor to exercise any sort of possession over the land, or to use any part of it as a means of profit or advantage to himself, would be in plain derogation of his grant, and a clear violation of the defendants’ rights. The defendants, under a deed conveying only a qualified fee, would, while their title continued, have the same right to the exclusive use and enjoyment of the land, and as complete dominion over it, for all purposes, as though they held it in fee simple absolute, and no one, I suppose, would pretend that it would be possible for a grantor, after making a title of that description, to set up, with the least show of success, a right or interest of any kind in the land conveyed.”

Upon this question of timber and the rights of the owner of a fee therein or, more largely speaking, upon the question of waste, to use the old common law term—the case of *Landers v. Landers*, 151 Ky., at pages 215-217, gives an instructive summary of

the law, and with special reference, in that case, to a defeasible fee. We think it may be convenient at this place to make the quotation :

“The next question to be determined is whether or not plaintiffs may recover damages from the estate of Bryant Landers for the timber cut and removed by him from the 170 acres of land devised to him by John Landers, and in which he owned only a defeasible fee. Our statute on the subject does not cover a defeasible fee, so recourse must be had to the common law. In 2 Blackstone, page 282. we find the following :

‘Let us next see who are liable to be punished for committing waste. And by the feudal law, feuds being originally granted for life only, we find that the rule was general for all vassals or feudatories: “*si vassalus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.*” But in our ancient common law the rule was by no means large; for not only he that was seized of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant save only in three persons: guardian in chivalry, tenant in dower, and tenant by the curtesy; and not in tenant for life or years; and the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by

his lessee; and, if he did not, it was his own default. But, in favor of the owners or the inheritance, the statutes of Marlbridge, 52 Hen. III, c. 23, and of Gloucester, 6 Edw. I, c. 5, provided that the writ of waste shall not only lie against tenants by the law of England (or curtesy), and those in dower, but against any farmer or other that holds in any manner for life or years. So that for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment for waste, *absque impetitione vasti*; that is, with a provision or protection that no man shall *impetere*, or sue him for waste, committed. But tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at its creation an estate of inheritance, and so not within the statutes. Neither does an action of waste lie for the debtor against tenant by statute, recognizance, or *elegit*; because against them the debtor may set off the damages in account; but it seems reasonable that it should lie for the reversioner, expectant on the determination of the debtor's own estate, or of those estates derived from the debtor.'

“The proprietor of a qualified or base fee has the same rights and privileges over his estate, till the contingency upon which it is limited occurs, as if he were tenant in fee simple. *Wal-singham's case*, Plowd., 557,—Chitty.

“In *Weed v. Woods*, 71 N.H. 581, it was held that where a deed reserves to a grantor a certain portion of the premises so long as a religious association may want it, the estate retained is a qualified or determinable fee; and during its continuance the grantor and his successors in title, while they retain possession, have all the rights of tenants in fee simple.

“Mr. Washburn, in his treatise on real property, 4th edition, volume 1, page 89, section 86, in speaking of the incidents of a determinable fee says:

‘So long as the estate in fee remains the owner in possession has all the rights in respect to it which he would have if tenant in fee simple, unless it be so limited that there is properly a reversionary right in another—something more than a possibility or reverter belonging to a third person, when, perhaps, chancery might interpose to prevent waste of the premises.’

“In *Gannon v. Peterson*, 55 L.R.A. 701, 193 Ill. 372, it was held that the opening of mines, and the mining of coal by the owner of a determinable fee in property of which the coal constituted the chief value, was not such waste as could be enjoined by the owners of the expectancy, who claimed under an executory devise—at least where it is not made to appear that the contingency which would determine the fee was reasonably certain to happen. In discussing the question the court said:

‘The authorities are uniform as to the definition, duration, and extent of a base or determinable fee. They are agreed that it is a fee-simple estate; not absolute, but qualified. Upon the death of the donee, his widow has dower, although the contingency may have happened that defeats the estate, and that within the general acceptation and meaning of the term the person seized of such an estate is not chargeable with waste.’

“The only exception to this rule is that equity will sometimes restrain equitable waste. Equitable waste is defined by Mr. Justice Story to consist of ‘such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them.’ 2 Story Eq. Jur., sec. 915. The same author further says: ‘In all such cases the party is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interests of other parties.’ Lord Chancellor Campbell, in *Turner v. Wright*, 6 Jur. N. S., 809, 29 L. J. Ch. N. S., 598, defines equitable waste to be ‘that which a prudent man would not do with his own property.’

“Even if an action for damages would lie for equitable waste, a question not decided, there is nothing in the record before us to show that Bryant Landers was guilty of such waste.

It does not appear that he was guilty of a wanton and unconscientious abuse of his rights, or that he did that which a prudent man would not do with his own property. We therefore conclude that the action for waste was properly dismissed.”

In the case of *Howe v. Lowell*, 171 Mass., pp. 582-3, the court said:

“As the grantee took the lands in fee, it is entitled to make any use of the land not in violation of the conditions in the deeds, *whether the parties thought of it or not.*”

Congress, when it attached to the otherwise unqualified estate of the grantee the covenant found in the settlers' clause, and when it made the grant itself, did think of some things—of some limitations or of some limitation upon the estate, but that limitation did not include the timber upon the lands granted. There was something in the lands granted—a product or component of the soil—which Congress did think of and which Congress expressly and pointedly excepted out of the estate, and that was the mineral therein.

The original act of July 25, 1866, in Section 10 thereof, reads as follows:

“And be it further enacted, That all *mineral lands* shall be excepted from the operation of this act; but where the *same* shall contain *tim-*

ber, so much of the *timber* thereon as shall be required to construct said road *over such mineral land* is hereby granted to said companies: Provided, that the term 'mineral lands' *shall not include lands containing coal and iron.*"

The act of May 4, 1870, Section 4, grants

"each alternate section of the public lands, *not mineral*, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof."

It is thus seen that Congress expressly dealt with the mineral contents of the lands granted by the act of 1866, and indeed, in an express but partial way, with the timber thereon; but the Congressional exception conspicuously includes in its limitation of the grant only such timber as there shall be, not on the granted lands, but on the excluded mineral lands, and even as to such excepted timber the company is accorded the right to use so much as shall be necessary "to construct said road over such mineral land." And in the act of 1870, the minerals, in distinction from the timber, are expressly excluded from the operation of the grant. And more than that, even in the exception of the minerals, it is provided that such exception shall not include coal and iron—a plain recognition of the grantee's right to the coal and to the iron existing

in the granted lands; and yet, in the decree as signed by the District Court, it seems not to have been enough to exclude our right to the timber standing upon the non-mineral unexcepted and granted sections, but all mineral deposits, including, therefore, the coal and iron, are excluded by the terms of the decree.

It is not of moment, as said in the Massachusetts case of *Howe v. Lowell*, *supra*, whether Congress thought of the timber or not. But Congress did think of the timber, and it thought of the minerals, and it dealt with the timber and with the minerals in a way to make it convincingly evident that so far as the lands actually granted were concerned, no limitation upon the estate of the grantee in respect to the timber, or in respect to the coal or iron, was contemplated or imposed. The case is a revealing instance of that canon of construction—the rule of *expressio unius*—which the Supreme Court invoked and applied in passing upon the question of a condition subsequent. For it will be remembered that the opinion of the court contrasts the expressed penalties of reverter and forfeiture attached by Congress to failure on the part of the grantee to construct the railroad within the prescribed time, or to file its assent within the prescribed time, with the absence of such penalties or of any penalty from the provisos in which the settlers' clause is contained.

It appeared from the record which the Supreme Court had before it (Vol. 13, pp. 6836-7) that the company had been under an expense, in administering the grant from April 1, 1870 to April 30, 1911, of \$1,184,542.84; and that it had paid taxes on the granted lands to 1910 inclusive, and that there had been levied on said lands taxes for the year 1911, and that during the more recent years of the above period taxes had been levied upon an assessed valuation in excess of \$2.50 per acre—ranging from \$2.96 per acre up to \$10.32 per acre—the taxes so paid and levied amounting to \$2,434,843.33 (Vol. 5, pp. 2567-); making a total administration expense, including taxes, of \$3,619,386.17. The total cash receipts from all sources, April 1, 1870 to April 30, 1911, including sales of land (Vol. 13, pp. 6836-7) are stated to be \$5,488,020.72. This leaves the company a net revenue from past transactions up to April 30, 1911, over and above expenses paid and taxes levied, of \$1,868,634.55. The average net revenue per acre for the lands sold, aggregating some 820,000 acres (Vol. 4, p. 1578) figured up to April 30, 1911, on the basis of the above items, was \$2.27.

The grant required the company to carry free for the United States government its property and troops, without limit as to time. The value of this free transportation, at the regular rates and computed for

the service over the company's line in Oregon between 1882 and 1911 inclusive, is \$1,894,970.09 (Vol. 13, pp. 6835-6, and computation based thereon). This amount is in excess of the receipts of the company, hereinabove mentioned by \$26,335.54. And if these figures could be carried down to date, the deficit would be considerably increased, and further, the average net revenue, above indicated, of \$2.27 per acre for the land sold, would be expressed by a diminished amount.

**COSTS WERE IMPROPERLY TAXED
AGAINST THESE APPELLANTS.**

The great question in the case, and upon which the decision of the District Court in the first instance, and afterwards of the Supreme Court, turned, was the question of forfeiture—whether the settlers' clause was a condition subsequent or a covenant. Upon that question these appellants prevailed. It may be suggested that we put testimony into the record, going to the question of estoppel and waiver, as against the right of the government to urge a violation on our part of the covenants, and it is true that the case did not go off upon the question of waiver or estoppel. But this same testimony, so put by us into the record, had its bearing upon the point on which the case was made to turn—that is to say, the question whether the settlers' clause was a con-

dition subsequent, for it went to the question of practical and contemporaneous exposition of the statute—and more particularly of its exposition at the hands of the Executive Department, charged with the administration of the law. It went to show by such exposition that the settlers' clause had been expounded and construed, in practice, as a covenant. This was recognized in the opinion of the Supreme Court, 238 U. S., at pages 424-5, where it is said:

“It is contended that if sales were made under the limitations of the provisos the breaches were acquiesced in, and for this the action and knowledge of the officers of the government are adduced—indeed the knowledge of Congress itself; and reciting what was done under the grants, counsel say: ‘It is a story of mortgages and sales, executory contracts and conveyances, and a stream of government patents flowing in between. These things were known of all; they were matters of common knowledge, notoriety, of public record; the railroad knew them; the people knew them, the government knew them.’ And cases are cited which, it is contended, establish that such circumstances might work an estoppel even against the government, which, when it appears in court, it is contended, is bound like other suitors, and certainly establish that for more than forty years in the view of the executive officers *the provisos were not conditions subsequent. Granting their strength in that regard, granting they have some*

strength in every regard, they have not controlling force, considering the provisos *as simple covenants*. And they cannot be asserted as an estoppel."

And if it be suggested, as it was suggested by the District Judge, that the United States "was required to bring this suit in order to determine as to the violations of this proviso, and the government has prevailed in the end and the court has declared that the railroad company has violated the provisos—I think for that reason the government should recover costs," the answer is not difficult. The government, in the first place never brought suit to determine as to the violations of the proviso on its own initiative. It was memorialized to do so, as we pointed out, by the Legislature of Oregon: and that memorial did not come into being until the year 1908, some forty years after the passage of the granting act, and more than thirty years after the administration of this grant, as it was administered by the railroad company ~~and~~ had become a "matter of common knowledge, of notoriety, of public record." The transactions of the railroad company in respect to the sales of these lands, as we have already noticed, were communicated in a detailed and itemized way to the bureau of the Interior Department, specially constituted to have such matters in charge, the transactions were communicated by the

bureau to the Secretary of the Interior, by him to the President and by the President to Congress. It is, we submit with deference, not equitable upon the grounds suggested and in view of the long and known history of the transactions, to tax costs against the railroad company, after it has prevailed in the substantive contention, upon a suggestion that the government was required, by the fault of the railroad company, to bring this suit "to determine as to the violations of this proviso." The very temporary injunction, which the government now seeks to import by this decree into the general injunction against future violations of the covenants, itself rested upon the very testimony which we put into this record as to the non-settlement character of the lands. The Supreme Court in its opinion, as we have quoted it, sums up that testimony and makes it the basis and explanation of the ^{finding} ~~rest~~ of the subject matter to Congress. It is, we think, a most unusual assessment of costs, under the circumstances of this case, to penalize these appellants, as this decree does (Tr. p. 96), with costs taxed at \$6,249.02.

In the case of *Northern Trust Company vs. Snyder*, 77 Fed. 818, the court said:

"Without undertaking to go further than the case before us requires, we are of the opinion that the appellant is entitled to the costs of this appeal. The appellant has succeeded in reversing the decree in the most important part, so

far as the amount of money is concerned. It is true the appeal was from the entire decree, and that the appellant contested the right of the appellee to the recovery of any amount. We think, however, it would be a harsh rule that would deprive an appellant of the statutory costs of appeal unless success attended the whole contention. Where the appeal has substantially prevailed we perceive no reason to deny to appellant the statutory costs which have been incurred in the successful attempt to assert a right."

While this language was used of costs on an appeal, it expresses the spirit and principle by which a court should be moved, a court of equity especially, in determining the assessment of costs.

In *Street on Federal Equity Practice* (Section 2022) it is said:

"Situations frequently arise where it is deemed inequitable for all the costs to be imposed on either party exclusively, and where this appears to be the case, the case may be disposed of without adjudging costs in favor of either, but leaving each to bear the costs of his own side of the litigation."

Of course, we are not authorized to ask for costs against the United States; but it must excite some special wonder that an application should have been made here by the government for costs, in view of the principal question at issue and the final adjudication of that question in the Supreme Court of the United States. It should excite some surprise that the government, defeated in its principal contention, should come to the court of first instance and ask that these appellants be penalized in costs because they substantially prevailed on the turning point of the case.

It is now respectfully submitted that the decree of the District Court, herein appealed from, is not in accordance with the opinion of the Supreme Court, and that it should be reversed, with directions to enter a decree, pursuant to the mandate of the Supreme Court of the United States, and without costs to these appellants; and such a decree, it is respectfully submitted, is the decree which the appellants proposed to the District Court and which is set forth in the transcript of this record.

Respectfully submitted,

WM. F. HERRIN,

P. F. DUNNE,

WM. D. FENTON,

*Solicitors for Defendants and Appellants,
Oregon and California Railroad Com-
pany, Southern Pacific Company, and
Stephen T. Gage, Individually and as
Trustee.*

FRANK C. CLEARY,

of Counsel.

3

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COM-
PANY, SOUTHERN PACIFIC COMPANY,
STEPHEN T. GAGE, individually and as
Trustee, and UNION TRUST COMPANY
OF NEW YORK, individually and as
Trustee,

Defendants and Appellants,

against

THE UNITED STATES OF AMERICA,

Appellee.

No. 2754.

Brief for Union Trust Company of N. Y.,

Defendant and Appellant.

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Filed

APR 24 1918

F. D. MCKINLEY

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, STEPHEN T. GAGE, individually and as Trustee, and UNION TRUST COMPANY OF NEW YORK, individually and as Trustee,

Defendants and Appellants,

against

THE UNITED STATES OF AMERICA,

Appellee.

No. 2754.

This is an appeal by the defendant, Union Trust Company of New York, and other defendants, from the decree entered in alleged pursuance of the mandate of the Supreme Court filed in the District Court, December 8th, 1915.

This appellant complains that the decree as filed does not conform in several vital particulars to the mandate of the Supreme Court, and is in other particulars unauthorized.

POINT I.

The District Court had no authority to enter a decree except in conformity to the mandate.

The rule applicable is laid down in the early case of *Sibbald v. United States* (12 Pet. 488), in these words:

“When the Supreme Court have executed their power in a cause before them and their final decree or judgment requires some further act to be done, it

cannot issue an execution but shall send a special mandate to the court below to award it (24 Sec. Judiciary Act, 1 U. S. Stat. 85). Whatever was before the court and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, nor review it upon any matter decided on appeal for error apparent, nor intermeddle with it, further than to settle so much as has been remanded."

These words have been cited with approval and the rule thus stated must be regarded as conclusively established. (*Re Sanford, Fork & T. Co.*, 160 U. S. 247; *Ex parte Union Steamboat Co.*, 178 U. S. 317; *Ex parte Fuller*, 182 U. S. 568.)

In the present case there is no mandate prescribing the form of decree. The language of the mandate is "that this cause be and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court (p. 7)." The opinion, while not prescribing the form of the decree, does specify with particular care the provisions which it shall contain. After the inquiry, "What shall be the judgment?", the Supreme Court proceeds as follows:

"A reversal of the decree of the District Court, of course, and clearly an injunction against further violation of the covenants" (p. 156).

Then inquiring what further relief shall be granted, the Court, after examining the bill of complaint and the relief there asked for, and finding that it is limited to lands unsold, directs that the decree shall contain a reservation as follows:

"Therefore, the decree in this suit shall be without prejudice to any other suits, rights or remedies

which the Government may have by law or under the joint resolution of April 30, 1908 (Res. 18; 35 Stat. 571) or under the Act of Congress passed August 20, 1912 (Ch. 311; 37 Stat. 320)."

Then, still inquiring respecting additional relief, the Court briefly refers to the testimony respecting the character of the lands, and their suitableness for sale to an actual settler, and the changed conditions which have arisen since the making of the grant, and then adds:

"We think, therefore, that the Railroad Company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the railroad.

"If Congress does not make such provision, the defendants may apply to the District Court within a reasonable time, not less than six months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the Court in its discretion may modify the decree accordingly."

The language cited from the opinion furnishes the only mandate to the District Court as to the decree to be entered.

POINT II.

The decree contains provisions which are not within the mandate of the Supreme Court, and which the Court had no jurisdiction to decide or include.

I. The first of the provisions improperly inserted in the decree is the injunction included in Paragraph II:

“And from selling any of the timber on said lands or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.”

The injunction thus granted is absolute, permanent and final. There is no reservation for subsequent modification or qualification. The fourth paragraph does make provision for a modification

“of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so.”

But this is in terms limited to the injunction contained in the third paragraph of the decree, and plainly was not intended to apply to the injunction contained in the second paragraph.

The Railroad Company is thus permanently enjoined from the sale of the timber and mineral on or in all the granted lands except in conjunction with the land.

(1) This is not the decree which the Supreme Court commanded the District Court to enter. That court ordered a permanent injunction against the violations of the covenants. That is adequately provided for by the first clause of the second paragraph of the decree. To add anything to the express mandate is "to give other and further relief" than that awarded by the Supreme Court, and this the District Court is prohibited from doing by the decisions above cited.

(2) No "interpretation of the opinion" can justify this permanent injunction restraining the sale of the timber and mineral, except in conjunction with the land.

The last two paragraphs of the opinion which enjoin any disposition of the land or timber until Congress shall have a reasonable opportunity to provide by legislation for their disposition, and limiting that injunction by the condition that if Congress shall not act the defendants may apply to the District Court within a time not less than six months for a modification of this injunction, and authorizing the court to modify the decree accordingly, were plainly not intended as a permanent and final adjudication that in no instance could the timber or mineral be sold except in conjunction with the land.

The reasons which led to the qualified injunction contained in the last two paragraphs are made plain by what precedes them read in the light of the undisputed facts disclosed by the record. The learned judge who wrote the opinion had just commented upon the testimony respecting the character of the lands and summarized the result as follows:

"It is, however, clear even from the Government's summary of the evidence, that lands which

may be fit for cultivation have a greater value on account of the timber which is upon them. Besides, *for our present purpose we may accept the assertion of defendants.*"

Further he adds :

"The lands invite now more to speculation than to settlement."

The conditions disclosed by the Government's evidence lead imperatively to the conclusion that a large part of the lands are incapable of sale to *bona fide* actual settlers. Attached to the Government's brief in the Supreme Court is an exhibit entitled a "Reduced Statement of Testimony as to the Character of Granted Lands," one column of which details "the percentage of land suitable for tillage when cleared." From this statement it appears that the witnesses for the Government testified that of the lands with respect to which they were examined upwards of a million acres were found to be not suitable for tillage when cleared. Some of the witnesses testified respecting the same lands, but making adequate allowance for this, the testimony for the Government unquestionably shows that a very large proportion of the land remaining unsold is not suitable for tillage when cleared. It appears further from another column of this statement that in the four counties of Lane, Douglas, Josephine and Jackson alone there are about 400,000 acres of land which, according to the testimony of the witnesses for the Government, are not suitable for settlement in tracts of a quarter section. These are facts which the Court could not and did not disregard. From them it follows that a large proportion of the granted lands remaining unsold can never be sold by the Railroad Company in honest compliance with the covenants as construed by the Supreme Court. These lands must then forever remain in mortmain unless relief is afforded by Congress.

It is not open to the Government to contradict this statement of fact. To assume that the Supreme Court did not find this to be the fact, would not only contradict the express language of the opinion, but would imply that that court did not give effect to an obvious feature essential to the right determination of the controversy. The defendants had taken a large volume of testimony respecting the character of the lands for the purpose of showing that to a large extent it was not susceptible of actual settlement. This evidence was presented to the District Court. The judge declined to consider it, regarding it as immaterial because the provisos, being in his opinion conditions subsequent, any sale of the lands in violation of the provisos was ground of forfeiture.

The Circuit Court of Appeals did not consider this evidence. It certified the case up to the Supreme Court. When the Supreme Court held that the provisos were not conditions subsequent, but were covenants, the question of fact as to the character of the lands became a *vital fact* in the case. Whether a court of equity should restrain the sale of all the lands to any person other than an actual settler and thus in effect issue a mandatory injunction compelling the sale of all the lands whether capable of settlement or not to an actual settler, whether it would enjoin the sale of the timber on all the land, necessarily required a consideration of the character of the land, and the Court could not proceed to the granting of such an injunction while the question remained totally undetermined. Recognizing this the Supreme Court said: "*For our present purpose we may accept the assertion of defendants.*" What is the assertion of the defendants? The Court had cited it just before. It was:

"That the lands capable of actual settlement and the establishment of homes thereon at no time 'exceeded (approximately) 300,000 acres, consisting of

small and widely separated tracts, all of which were sold to actual settlers or persons claiming to be such during construction and prior to completion, respectively, of said railroads, in quantities of 160 acres or less to a single purchaser at prices not exceeding \$2.50 per acre' " (p. 158).

It must be assumed then that in directing the injunction the Court was acting upon the conceded fact that a large proportion of the lands remaining unsold are incapable of actual settlement, *and that as a consequence it was in effect granting an injunction against selling such lands at all.*

This, we say, is the necessary result of the construction placed upon the provisos. This is not the result of changed conditions or of the conduct of the Railroad Company. It always was so and always must remain so, because it is a physical fact, and lands of this character must therefore remain unsold unless the provisos are modified by the action of Congress, "having due regard for the rights of said California & Oregon Railroad Companies" (14 Stat. 239).

The question then arises as to the timber on these quarter sections. Must that remain forever unsold? Because the Railroad Company cannot sell the land, does it follow that it cannot sell the timber? We think plainly not. The Supreme Court has held that:

"There was a complete and absolute grant to the Railroad Company with power to sell limited only as prescribed, and we agree with the Government that the Company 'might choose the actual settler, might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60 or 100 acres or any amount not exceeding 160 acres', and we add it might choose the time for selling or its use of the grants as a means of credit subject ultimately to the restrictions imposed."

The grant of the land carried with it the title to the timber. Apart from the provisos, the Railroad Company had an undoubted right to cut and dispose of the timber. It may be conceded for the purposes of the present argument that the provisos restricted that right so far as interference with the timber might prejudice the sale of the lands to actual settlers or their enjoyment by actual settlers, but it restricted it no further. The ownership of the timber was absolute in the Railroad Company, except as that ownership was inconsistent with the duty of the Company to sell the lands to actual settlers. If there was no such duty, the title to the timber was necessarily absolute. In the case of lands incapable of actual settlement, there could be no such obligation, and hence, the right to the disposition of the timber upon such lands was necessarily absolute in the Company. Upon the concession as to the facts, it necessarily followed that as to a large proportion of the unsold lands, the restrictive covenant could not limit or affect the title of the Railroad Company to the timber on such lands, because they were incapable of sale to an actual settler. The Supreme Court was not inattentive to this situation, nor to the situation respecting other lands than those which were not susceptible of sale to an actual settler. Some of the land, although carrying merchantable timber, is susceptible of cultivation. In many instances, however, the timber is much more valuable than the land. The record shows that there are some quarter sections the timber upon which is worth \$60,000. To sell this land to an actual settler for \$2.50 an acre would be to enrich the purchaser without any commensurate return to the Government or to the Railroad Company. It might lead also to other serious abuses. The Railroad Company having the selection of purchasers, would be at liberty to sell valuable tracts to favorites at this grossly inadequate figure.

But a sale of a portion of the timber on these lands might not be inconsistent with a sale of the land to actual settlers in analogy with a well-understood rule respecting waste in cutting timber.

30 A. & E. Ency. Title Waste, p. 242.

In order to permit Congress or the parties to find some method by which practical conditions could be made to harmonize with legal rights, and for the mutual benefit of the Railroad Company and the Government, the Court suggested a stay of proceedings to afford a time for such action. But further than that, the Court did not go.

(3) The decree as entered attempts to determine the rights of the Railroad Company in the timber on the lands by permanently enjoining the Railroad Company from making sales of it, except to actual settlers.

The District Court had no jurisdiction to make such decision because, as we have seen, the Supreme Court had not so decided. But further, the Supreme Court would have had no jurisdiction to make such decision if it had attempted to do so. As we have seen, it had held that the title to the lands in the Railroad Company was absolute and complete subject to the restriction. It is also held that the restriction applied to all the lands.

In answer to the contention that the limitation applied only to lands capable of actual settlement, the Court said:

“But neither the provisos nor the other parts of the granting act make a distinction between the lands, and we are unable to do so. The language of the grant and of the limitations upon them is general. We cannot attach exceptions to it.”

Again:

“The character of the lands furnishes no excuse (for selling to persons other than actual settlers).”

It might have justified non-action, but it did not justify antagonistic action."

Again:

"Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress *to relax the law*. They were neither cause nor justification for violating it."

It may not well be doubted that this determination was within the issues made by the pleadings. But the further question as to a disposition of the timber upon lands not susceptible of sale to a *bona fide* actual settler for settlement was not within the issue presented by the pleadings nor open to determination by the District Court, or by the Supreme Court upon appeal. That was a question entirely distinct from the issue presented. The Supreme Court, therefore, did not attempt to determine it, but contented itself by affording an opportunity for action by Congress or the parties.

It is, we submit, manifest from the whole scope of the bill of complaint and answers that the right to the disposition of the timber on quarter sections not susceptible of sale to actual settlers, was not an issue in this case. The bill proceeded upon the assumption that all the lands were capable of settlement. It made no distinction in the character of the land. It presented no question as to the rights of the parties to the timber on any particular description of lands. It did not challenge the right of the Railroad Company to remove the timber in whole or in part, either in aid of the sale of the land to actual settlers or in the case of the impossibility of sale of particular lands to an actual settler. The Court below did not attempt to pass judgment upon that question. It distinctly refused to consider the evidence upon which such issue, if presented, could have been determined. That being so, the Court

has not now the power, without trial of the issue, to grant a permanent and final injunction restraining the defendants from selling the timber except in conjunction with the land, which is in effect a final judgment upon an undetermined issue.

Windsor v. McVeigh, 93 U. S. 274.

Reynolds v. Stockton, 140 U. S. 254.

In the case first cited, the Court said :

“All courts, even the highest, are more or less limited in their jurisdiction. * * * Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand the court notwithstanding its complete jurisdiction over the subject and parties has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract, If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.”

II. The decree departs from the mandate in the third paragraph in several particulars.

(a) It does not follow the language of the opinion respecting the disposition of the land or timber and includes in the injunction mineral or other deposits as to which nothing is said in the opinion.

(b) It enjoins the defendants

“from disposing of, receiving or exerting any control over any money which arose or which may hereafter arise from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise and now on deposit with any bank, Clerk of Court or other institution or person to await final decision of the United States Supreme Court in this case until Congress shall have a reasonable opportunity to make provision by legislation for the disposition thereof, etc.”

This takes from the defendants the right to receive, control and enjoy, money as to which nothing whatsoever is said in the opinion of the Supreme Court. The fourth paragraph permits the defendants to apply to the Court for a modification of the injunction, and the Court “reserves the right to modify this decree in that regard if in its opinion good cause shall then exist for doing so.” It does not appear from the record or otherwise that the defendants’ right to the money so impounded was a matter in issue in this cause. If for any reason not disclosed by the record the possession of this fund should be tied up for a time, one would expect that upon the termination of the period the decree would provide that the rights of the parties therein should be determined according to law. By this decree the control of the money and, therefore, in effect its ownership, is adjudged presumptively against the defendants without hearing, and they are left merely the liberty to apply to recover it back.

III. We transcribe the third and fourth paragraphs of the decree for convenience of reference:

“3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making or agreeing to make, either directly or

indirectly, any disposition whatsoever of said lands or any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing, or authorizing the cutting or removal of the timber thereon or any part thereof; from removing or authorizing the removal of mineral or other deposits therein; and from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to await the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral, or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendants all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so."

By the third paragraph the Railroad Company in effect is divested of the title to the land and the timber thereon and the mineral therein. It is enjoined from exercising any

act of ownership. The title remains divested until action is taken as hereafter stated. By the third paragraph this divestiture continues until Congress shall have a reasonable opportunity to make provision by legislation, etc. By the fourth paragraph it is provided that if Congress shall not make provision for the disposition of the land, etc., the defendant may apply for a modification of the injunction contained in the third paragraph, and the court reserves the right to modify the decree in that regard if in its opinion, good cause shall then exist for so doing.

As we understand it, this is not within the mandate of the Supreme Court. The Supreme Court suspended the disposition of the land and timber until Congress should have an opportunity to legislate, but if Congress did not choose to legislate within the time limited, the Court did not intend to give the District Court discretion to continue the injunction indefinitely, because that would be in effect to make the rights of the parties depend not upon the law of the land, but upon the discretion of the judge in terminating or continuing the injunction. The Railroad Company had the right to sell to actual settlers such land as it could sell to actual settlers, and the Supreme Court certainly did not intend to divest the Railroad Company of this right and substitute for it the right to sell subject to the discretion of the District Court.

The Supreme Court had not decided that the Railroad Company could make no disposition of the timber upon the sections of the land which were not susceptible of sale to actual settlers. As we have already argued, it was not within the jurisdiction of any of the courts before which this cause had been pending, to make such a decision.

When the language of the opinion is compared with the language of the decree, it will be seen that the discretion which the Supreme Court intended the District Court

should exercise, was not at all a discretion as to *rights*, but solely a discretion in arranging details essential to the protection of those rights, when the proposed stay should terminate.

In brief, the contention of this defendant (and it speaks solely for itself) is that the grant to the Railroad Company having been adjudged absolute with a power of sale upon the terms of the provisos, no Court has jurisdiction to suspend the exercise of this unquestioned right (or of the judgment of a court, except by statutory authority), much less to make the exercise of that right conditional upon obtaining from the District Court an order permitting its exercise; that if the defendant had the right to cut and sell the timber, no Court had jurisdiction to suspend the exercise of that right or to make it conditional upon obtaining an order of the District Court; the question whether the Railroad Company has the right to sell the timber on lands not susceptible to sale to actual settlers, was not in issue in this case and the Court has not decided and could not decide that question. Therefore, it was without jurisdiction to prohibit the sale of the timber on such lands.

While the sale of this land and timber is suspended, taxes are accumulating on the basis of the value of the lands as timbered, and these taxes are a lien prior to the lien of this defendant. If a considerable part of the lands can never be sold and if the timber upon them can never be sold, the defendant's security on the land will gradually disappear.

Whatever power Congress may have, under the reserved right to amend or repeal the granting act, no one has supposed that that power is vested in the Courts.

IV. The decree awards costs against the Union Trust Company of New York, individually and as trustee, and the costs have been taxed at \$6,249.02. The mandate of the Supreme Court is silent with regard to costs. Assuming that the District Court had power to award costs in its discretion, we submit that the awarding of costs against the Union Trust Company of New York, individually and as trustee, was not equitable.

The grant was made in 1866. On July 1st, 1887, the Railroad Company, being in the hands of a receiver, and the road constructed only in part, the bondholders represented by the Union Trust Company of New York advanced the sum of \$20,000,000 to accomplish the primary purpose of the Government in the construction of the road. The money was applied to that purpose and the road was completed. The money was advanced upon the security of the lands granted. The road having been constructed and the Government having secured the end which it sought to attain, this suit was brought and in it the Government undertook to take from the bondholders the security upon which they had advanced the money, there then remaining unpaid the sum of upwards of \$17,000,000. The Government based its claim to deprive the bondholders of this security upon the ground that the grant had been forfeited by a breach of condition subsequent. The Union Trust Company of New York, as trustee for the bondholders, was made a party defendant. It had no alternative except to resist this unwarranted claim. To have failed to do so would have been a distinct breach of trust. It was successful in reversing the judgment of the Court below and in securing the granted lands for the bondholders, subject to the provisos which, however, the Court construed less favorably to the bondholders than the trustee had urged. Neither in the bill of complaint nor in the proofs nor in the

argument of counsel has it been suggested that defendant was guilty of any wrongful act for which it should be visited by the infliction of costs. No reason has been assigned by the Court for the imposition of costs upon this defendant, and we submit that the action of the Court in this respect was erroneous.

Higgins v. Eaton, 204 Fed. 273.

POINT III.

The decree as entered should be modified by striking out the last part of the second paragraph beginning with the words "and from selling" and by striking out the whole of paragraphs three and four and so much of paragraph seven as awards costs against the defendant Union Trust Company of New York, individually and as trustee.

Dated, New York City, April 18, 1916.

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IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT.

OREGON & CALIFORNIA RAILROAD COMPANY
ET AL.,

Appellants.

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

CONSTANTINE J. SMYTH,

Special Assistant to the Attorney General.

HOGAN LINOTYPING CO., OMAHA

Filed

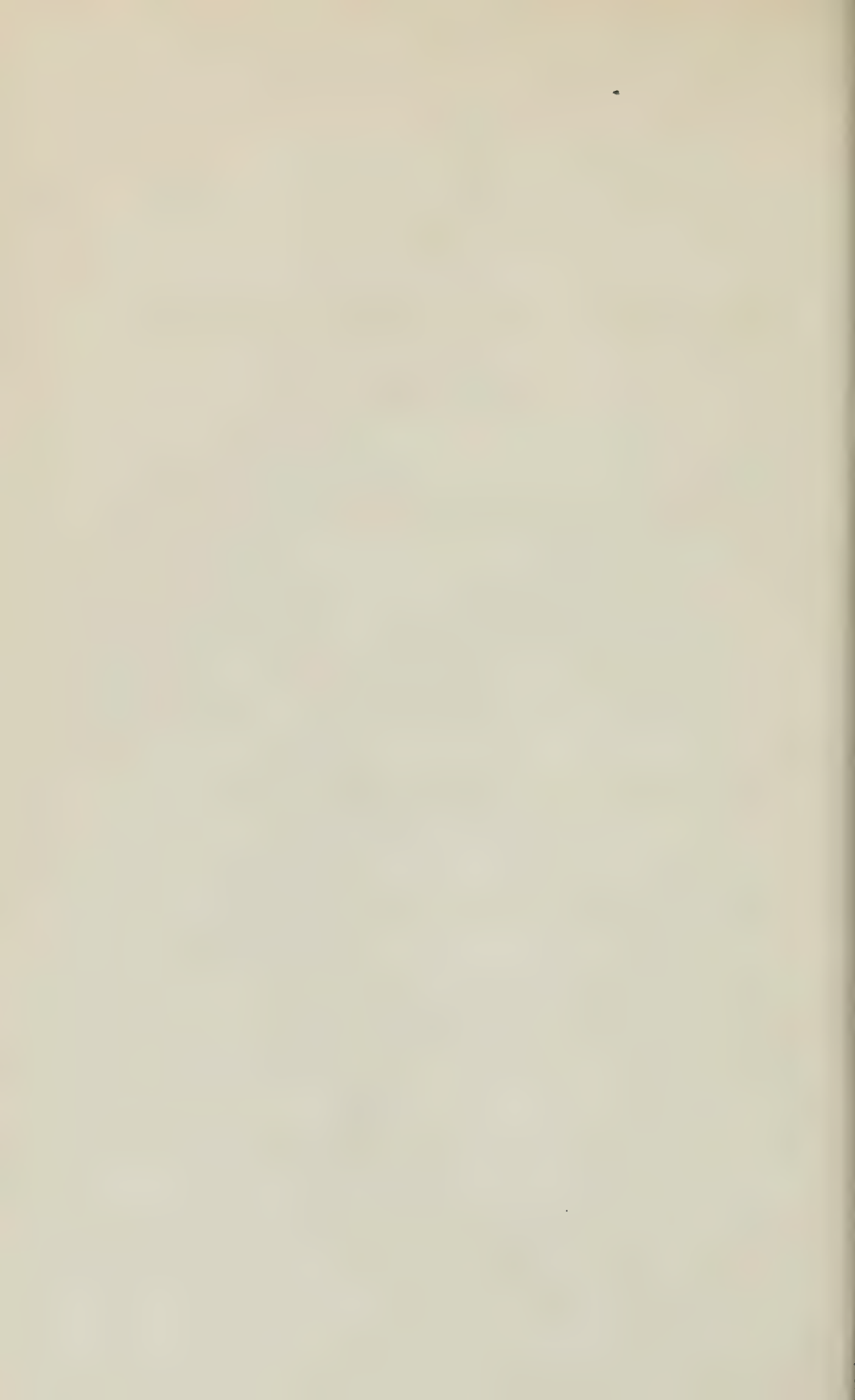
E. D. Manselton

CONTENTS.

Statement of the Case.....	1-2
Argument	7
The Decree of the lower court is in exact accord with the mandate of the Supreme Court.....	7
Actual settlers	13
Money on deposit.....	14
Discretion of the court in modifying temporary injunction	14
Other reservations by the court.....	15
The costs	15
Refusals of the trial court.....	16

CASES CITED.

(32 Cyc. 655).....	8
Higgins Oil Co. v. Snow (113 Fed. 433).....	8
Oregon & California R. R. Co. v. United States (35 S. C. R. 908)..	1-2-3-4-5-6-9-10-13-14-17
Reeves on Real Property (Sec. 243).....	12
Swift v. United States (196 U. S. 375-395).....	10
Tyler Min. Co. v. Sweeney (79 Fed. 281).....	15



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BRIEF FOR THE UNITED STATES.

STATEMENT.

The general question presented by this appeal is whether the decree of the lower court conforms to the mandate of the Supreme Court, the concluding paragraph of whose opinion reads thus:

“Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion” (35 S. C. R. 926).

To determine this question we must examine the opinion. The following excerpts illustrate it. [Italics wherever they appear are mine.]

This is the opening sentence:

“A direct and simple description of the case would seem to be that it presents for judgment a few provisions in two acts of Congress which neither of themselves nor from the context demand much effort of interpretation or construction” (Id. 916).

Then the respective claims of the parties are given:

“The government contends that the provisos, we so designate them and shall so refer to them, though they differ in technical language, constitute conditions subsequent, and that by the alleged breaches indicated the lands became forfeited to the United States. The railroad company and other defendants contend that the provisos constitute restrictive and unenforceable covenants. The cross complainants insist that a trust was created for actual settlers, and the intervenors urge that the trust has the broader scope of including all persons who desire to make actual settlement upon the lands” (Id. 916).

Speaking of an admission made by some of the defendants, it is said:

“They would confine it, or seem to do so, to the compulsion of sales of land susceptible of actual settlement, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken as they were given. Assent to them was required

and made, and we cannot import a different measure of the requirement and the assent than the language of the act expresses. It is to be remembered the acts are *laws* as well as grants, and must be given the exactness of laws.

If the provisos were ignorantly adopted, as they are asserted to have been; if the actual conditions were unknown, as is asserted; if but little of the land was arable, most of it covered with timber and valuable only for timber, and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; if its character was given evidence by the application of the timber and stone act to the reserved lands; if settlers neither crowded before nor crowded after the railroad, nor could do so; if the grants were not as valuable for sale or credit as they were supposed to have been and difficulties beset both uses,—the remedy was obvious. Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it. Besides, we may say that there is a controversy about all of the asserted facts and conclusions.

Our conclusion, then, on the contentions of the government and the railroad company, are that the provisos are not conditions subsequent; that they are covenants, and enforceable; and we pass to the other contentions of the company" (Id. 920).

Denying the right of the defendants to urge an estoppel, the court said:

"No one was deceived, at least no one should have been deceived; no action was or should have been induced by them that could plead ignorance of the provisions and *immunity* from their responsibility" (Id. 921).

In another place the opinion reads :

“We may observe *again* that the acts of Congress are *laws* as well as grants, and have the constancy of laws as well as their command, and are operative and obligatory until repealed” (Id. 922).

Again :

“The character of the lands furnished no excuse. It might have justified nonaction, but it did not justify antagonistic action” (Id. 922).

The court introduces its discussion of the rights of the cross complainants and interveners by saying :

“The provisos of the act having been thus established as covenants, not conditions subsequent, between the government and the defendants, and their *continuing* obligation determined, we are brought to a consideration of the rights of the cross complainants and interveners thereunder” (Id. 923).

After disposing of the claims of the cross petitioners and interveners adversely to them, the court returns to the controversy between the government and the railroad companies :

“In conclusion, we cannot refrain from repeating that the case in its main principles is not in great compass. It has been given pretension and complexity by the happening of the unforeseen, the lapse of time, change of conditions, and the contests of interests. These, however, are but accidents, giving perplexity and prolixity to discussion. *Judgment* is independent of them. It is determined by the *simple words* of the acts of Congress, not only regarded as grants, but as *laws*, and accepted

as both; granting rights, but imposing obligations, —rights quite definite, obligations as much so” (Id. 925).

Further on it is said:

“We can *only* enforce the provisos *as written*, *not relieve* from them.”

Then follows this:

“Rejecting, then, the contention of the government and the contentions of the cross complainants and interveners, and regarding the settlers’ clauses as enforceable covenants, what shall be the judgment? A reversal of the decree of the district court, of course, and clearly an injunction against further violations of the covenants. There certainly should be no repetition of them. What they were the record exhibits” (Id. 925).

Again:

“In view of such disregard of the covenants, and *gain of illegal emolument*, and in view of the government’s interest in the *exact* observance of them, it might seem that *restriction* upon the future conduct of the railroad company and its various agencies is imperfect relief” (Id. 925).

Further on it is said:

“However, an injunction simply against future violations of the covenants, or, to put it another way, simply mandatory of their requirements, will not afford the measure of relief to which the facts of the case entitle the government” (Id. 925).

Later on this occurs:

“It is, however, clear, even from the govern-

ment's summary of the evidence, that lands which may be fit for cultivation have a greater value on account of the *timber* which is upon them'' (Id. 926).

The court then gives its final conclusion upon the whole case:

“This, then, being the situation resulting from conditions now existing, incident, it may be, to the prolonged *disregard* of the *covenants by the railroad company*, the lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the *timber* thereon, and from cutting or authorizing the cutting or removal of any of the *timber* thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.

If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its *discretion* may modify the decree accordingly.

Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion'' (Id. 926).

ARGUMENT.

The Decree of the Lower Court is in Exact Accord With the Mandate of the Supreme Court.

Shortly after the Supreme Court had handed down its opinion, counsel for the defendants sent to the Clerk of the Supreme Court a pamphlet which they denominated "Petition of defendants and appellants * * * for modification of opinion rendered." In support of the petition they said:

"Nor, we submit, could it be questioned that the grantee would be authorized to remove stone from the lands * * * and if all this be true there is no reason apparent to us upon the face and terms of the statute why the right of the grantee in a like way to make use of the timber upon the land should be differentiated" (p. 7).

Again:

"But the removal of the timber upon this land would not go in defeat of the settlement policy of the act, but would be directly in aid of such policy" (p. 9).

In a speech delivered at Salem, Oregon, to a large body of citizens called to consider the opinion of the Supreme Court, one of counsel for the defendants stated in substance that there was nothing in the opinion which prohibited the railroad company from disposing of the timber on the land, or the stone or other minerals that might be found in it, and this theory was given wide circulation.

It was believed by the government that there was no warrant in the opinion of the Supreme Court for such a theory, and therefore it was deemed wise to make the decree specific upon that point, always keeping it, of course, within the terms of the mandate.

That which was granted by the two granting acts to the railway companies was "land." The opinion speaks of it as "land." The term "land"—

"Includes not only the face of the earth, but everything under it or over it, and has in legal signification an indefinite extent upward and downward."

(32 Cyc., 655, Higgins Oil Co. v. Snow, 113 Fed., 433.)

Washburn, in his work on Real Property, says:

"Land is always regarded as real property, and ordinarily whatever is erected or growing upon it, as well as whatever is contained within it or beneath its surface, such as minerals and the like, upon the principle that '*cujus est solum, ejus est usque ad caelam*' in one direction, and '*usque ad orcum*' in the other" (1 Washb. Real Property, 3).

Therefore, the word "land," as used in the granting acts and in the opinion of the Supreme Court, embraces not only the surface but the trees growing thereon and the minerals beneath the surface. When the granting acts say that "the lands granted by the act aforesaid shall be sold to actual settlers only," it means that the minerals and the trees, as well as the surface, shall be sold to actual settlers only. It does not contemplate that they shall be sold apart, but as

one, and by the acre, for the proviso further declares that the sale shall be not only to actual settlers but also "in quantities not greater than one quarter section to one purchaser and for a price not exceeding \$2.50 per acre."

How could the trees be sold to an actual settler who did not at the same time acquire a right to the surface? How could minerals be sold to an actual settler who did not at the same time have a right to the surface? It is clearly within the contemplation of the restrictive proviso just quoted that the actual settler shall have title to all above as well as all beneath the surface.

If the railroad company could sell the timber on 160 acres of land for \$10,000—and there are many quarter sections which contain timber of that value—to one person, while disposing of the surface of the land to another person, an actual settler, for \$2.50 an acre, would it not be receiving more than \$2.50 an acre for the land? Yet that is all it was entitled to receive under the terms of the grants. The opinion in no place gives countenance to any other view. It says in its opening sentence that—

"A direct and simple description of the case would seem to be that it presents for judgment a few provisions in two acts of Congress which neither of themselves nor from the context demand much effort of interpretation or construction" (35 S. C. R. 916).

This means that the provisos mentioned are plain and easily understood.

In another place the opinion says:

“The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken as they were given. * * * It is to be *remembered* the *acts* are *laws* as well as grants, and must be given the exactness of laws” (Id. 920).

The term “\$2.50 an acre” means \$2.50 an acre and no more.

In other words, to paraphrase the language of Mr. Justice Holmes, the granting acts are to be taken to mean what they fairly convey to a dispassionate reader “by a fairly exact use of English speech” (196 U. S., 375-395).

In another place the opinion says that the judgment of the court is to be determined—

“By the *simple words* of the acts of Congress not only regarded as grants but as *law*, and accepted as both.”

Again:

“We can only enforce the provisos *as written, not relieve from them*” (Id. 925).

From these excerpts it is very clear that the grantees are prohibited by the restrictive provisos from obtaining more for the land than \$2.50 an acre and that they must sell it to actual settlers only. Moreover, if the appellants’ view of the opinion be correct, there would be no violation of the restrictive proviso by sell-

ing the timber on each 160 acres at ten, twenty, or fifty dollars an acre, provided it is not sold to an actual settler. If this be so, it is more than likely that appellants never violated the granting act, for it may well be doubted whether they ever received more than \$2.50 an acre for the use of the surface of the land. What a monstrous mistake, then, has been made by the court and counsel! Defendants' contention seems to be that the restrictive provisos do not apply to the timber on the land or the minerals beneath the surface, but only to the disposition of the surface apart from the timber and the mineral. We repeat there is no warrant for such an interpretation of the "simple words" of the grants.

But when we come to consider the directions of the Supreme Court with respect to the restraints which should be placed upon the appellants, we see clearly that their contention rests upon an unsound foundation. Whatever doubt may have existed before must disappear in the presence of those instructions. First, the defendants are forbidden to make sales of the lands "in violation of the covenants." That is, they must not sell them for more than \$2.50 an acre to any person who is not an actual settler or in quantities greater than 160 acres to a single purchaser.

The word "lands," as we have seen, includes the trees and the minerals, as well as the surface. Since the lands cannot be sold to any but an actual settler, then of course neither the trees nor the minerals can be sold to one who is not an actual settler, and in no case can the railroad company exact more than \$2.50 an acre.

If the mandate does not apply to the timber, why did the Supreme Court direct an injunction against "any disposition * * * of the timber thereon" and against "cutting or authorizing the cutting or removal of any of the timber thereon?" Because the court treated the timber as a part of the land, just as the mineral must be treated. No other view finds any support either in the granting acts, the opinion of the court, or general law.

The defendants in their petition to the Supreme Court for a modification of the opinion refer to Reeves on Real Property, Sec. 423, wherein it is said:

"*Subject to any restrictions* under which he may have taken it, and subject also to the mandate of the maxim *sic utere tuo ut alienum non laedas*, its owner when in possession may use it" (the land) "for any purpose and in any manner that he may choose; he may cut timber, open and work mines, cultivate the soil even to exhaustion" (p. 9).

This text is also referred to on p. 41 of their brief on this appeal.

Note the opening words, "Subject to any restrictions." The restrictions here are found in the enforceable covenant, and the right of the defendants in the lands is limited by them.

The terms "land," we repeat, embraces trees and minerals.

Consequently, when in the second paragraph of the decree the *lower* court restrains the defendants from disposing of the trees or the minerals apart from

the lands, it was well within the mandate which forbade the disposition of the lands to any but an actual settler.

In the brief of the Union Trust Company it is urged (p. 6) that—

“If the defendants are restrained from selling the timbers apart from the land, that part of the land which is timbered but not susceptible of ‘actual settlement,’ can never be sold by the railroad company in honest compliance with the covenants as construed by the Supreme Court.”

This is only a restatement of the argument based on the character of the land and urged by the defendants in the Supreme Court. To it the court replied:

“If but little of the land was arable, most of it covered with timber and valuable only for timber, and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest * * * the remedy was obvious. Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law. They were neither cause nor justification for violating it” (p. 920).

The application is obvious. Nothing need be added.

Actual Settlers.

Complaint is made because the phrase “actual settler” is qualified by the words “on the land sold to him.” Clearly this is what is meant by the proviso which says that the land shall be sold to actual settlers. It does not mean actual settlers on other lands, but on the land bought.

The Money on Deposit.

The money mentioned takes the place of timber sold and land condemned subsequent to the commencement of the suit. By agreement of the parties, the trial court directed that the money be placed on deposit to await the final outcome of the litigation. If the land and timber for which the money was substituted might not be disposed of pending legislation by Congress, then, of course, the money should also remain intact until Congress should have an opportunity to act. This must be clear. The purpose of the opinion is to hold everything pertaining to the grant in *statu quo* until Congress has had a reasonable opportunity to make provision for the disposition of the whole subject.

The Discretion of the Court in Modifying the Temporary Injunction.

The Union Trust Company in its brief says:

“The court did not intend to give the District Court discretion to continue the injunction indefinitely, because that would be in effect to make the rights of the parties depend not upon the law of the land but upon the discretion of the judge in terminating or continuing the injunction” (p. 15).

But the Supreme Court did commit the matter to the discretion of the court, for it says:

“The defendants may apply to the District Court within a reasonable time for a modification * * * of the injunction * * * and the court in its *discretion* may modify the decree accordingly” (p. 926).

The decree, then, is in harmony with the mandate.

Other Reservations by the Court.

The opinion of the Supreme Court reserves to the government all rights or remedies which it might have "by law or under the joint resolution of April 13, 1912, *supra*, or under the act of Congress passed August 20, 1912, *supra*," against the defendants on account of the sold lands (p. 925).

The sixth provision of the decree expresses this reservation.

The Costs.

The mandate directs a general reversal of the lower court's decree. This put the case where it was before the decree had been entered. Thereupon the lower court, in obedience to the mandate, entered a new decree in favor of the complainant and against the defendants upon the record as it had been made.

Suppose the trial court in the first instance, instead of entering a decree declaring a forfeiture, had entered such a decree as the mandate required. Would there be any doubt about the complainant's right to costs? Surely not. It had prevailed, and the prevailing party is always entitled to recover his costs unless there be some valid reason appealing to the sound discretion of the court for not allowing them.

This court in *Tyler Min. Co. v. Sweeney*, 79 Fed., 281, said:

“In equity cases and in other cases where there are no statutory provisions or rules of practice, the award of costs, as well as the taxation thereof, rests in the sound discretion of the trial court and could not be reviewed in the appellate court except in cases of a manifest abuse of such discretion.”

This discretion, of course, is a judicial discretion, not an arbitrary one. Is there any reason in this case why the appellants should not be compelled to pay the complaint its costs? The illegal action of the defendants forced the complainant to go into court for relief. It plead the granting acts—the law—and showed that they had been violated by the defendants. This the latter denied. In consequence of the denial much testimony was taken. The court found that the granting acts had been violated, that, in the language of the Supreme Court, the railroad company was guilty of a “prolonged disregard of the covenants.” Where, then, is there any equitable cause for relieving the law breaker from the consequence of its acts?

Appellants place themselves on the proposition that the Supreme Court did not order them to pay costs. When it directed the lower court to enter a decree in accordance with the opinion it impliedly directed that court to award costs in accordance with the usual rules of equity. Hence the court was within its rights in directing that the defendants, the losing parties, should pay the costs.

In the brief filed on behalf of the railroad companies and Gage, we read (p. 58):

“It should excite some surprise that the government, defeated in its principal contention, should come to the court of first instance and ask that these appellants be penalized in costs because they substantially prevailed on the turning point of the case.”

This is rather startling. True, the government was defeated in its contention that the restrictive provisos constituted a condition subsequent. But what about the insistence, often repeated, of the appellants that the restrictive provisos were “unenforceable covenants?” (35 S. C. R. 916).

Assuming that the value of the land “exceeds thirty millions” as stipulated, how stands the result of the contest? The government claimed all. So did the railroad companies. The judgment of the Supreme Court is that the railroad companies are entitled to \$4,750,000, or \$2.50 an acre, for the land involved, 2,300,000 acres, and the government to the remainder, or \$25,250,000. Does this indicate that the government was “defeated” and that appellants “substantially prevailed?” We pause for an answer. No, the government succeeded, and is entitled to its costs.

Refusals of the Trial Court.

Assignments of error marked 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28, are based upon the failure of the court below to decree certain things enumerated therein. Insofar as those things are in conflict with what it did decree they should not have been granted, but insofar as they are not,

even if they were proper under any circumstances—which they were not—no request was made for their incorporation in the decree.

This is revealed at once by an inspection of the draft of decree presented by the defendants (R. pp. 36-37), but as we have said, it would not have been proper for the court to have placed any of them in the decree. To do so would have been to go outside of the terms of the mandate.

The decree of the lower court obeys in every particular the directions of the Supreme Court, and therefore should be affirmed.

Respectfully submitted,

CONSTANTINE J. SMYTH,

Special Assistant to the Attorney General.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

IN THE MATTER OF THE PETITION OF THE
EQUITABLE TRUST COMPANY OF NEW
YORK, AS TRUSTEE, FOR A WRIT OF MAN-
DAMUS TO BE ISSUED AND DIRECTED
TO HONORABLE WILLIAM C. VAN FLEET,
JUDGE OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE NORTHERN DIS-
TRICT OF CALIFORNIA, AND TO SAID DIS-
TRICT COURT.

EX PARTE EQUITABLE TRUST COMPANY OF
NEW YORK, AS TRUSTEE OF THE FIRST
MORTGAGE OF THE WESTERN PACIFIC
RAILWAY COMPANY, PLAINTIFF IN THE
ACTION OF EQUITABLE TRUST COMPANY
OF NEW YORK, AS TRUSTEE, AGAINST THE
WESTERN PACIFIC RAILWAY COMPANY.

THE EQUITABLE TRUST COMPANY OF NEW
YORK, as Trustee,

Appellant,

against

WESTERN PACIFIC RAILWAY COMPANY, et al.,
Respondents.

STATEMENT OF FACTS.

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Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

Filed

MAR 17 1916

F. D. Monckton

Clerk

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STATEMENT OF FACTS.

PROCEEDINGS BETWEEN PARTIES TO THE SUIT IN
THE COURT BELOW.

On the 2nd day of March, 1915, The Equitable Trust Company of New York, as Trustee, filed its bill in the District Court of the United States for the

Northern District of California for the foreclosure of the First Mortgage of the Western Pacific Railway Company, bearing date September 1, 1903, but acknowledged and delivered June 23, 1905, and for the appointment of a Receiver, *pendente lite*, of the property covered by the mortgage; the jurisdiction of the court being based upon diversity of citizenship. Although the bill set forth that the entire amount of \$50,000,000 of bonds secured by the mortgage sought to be foreclosed had been duly issued and were then outstanding, the only default alleged was in the payment of one semi-annual instalment of interest matured March 1, 1915, amounting to \$1,250,000; and that amount only was alleged to be due and unpaid. The prayer of the bill so far as it related to foreclosure was in the usual form; and so far as it related to the appointment of a receiver was:

“That a receiver may be appointed to take possession of and to operate the properties of defendant which are *subject to the lien of such First Mortgage* and to collect and receive the tolls, earnings, revenue, rents, issues, profits and other income thereof and to apply the net income thereof to the benefit of the holders of bonds secured by such First Mortgage as provided by the terms thereof, and with such other powers and authority and limitations of power and authority as to this honorable court shall seem proper.”

On the same day the Western Pacific Railway Company, then the sole defendant in the suit insti-

tuted by the filing of such bill, filed its answer admitting all the allegations of the bill; and, on the following day, the court made its order in the cause appointing Warren Olney, junior, and Frank G. Drum as Receivers, and they duly qualified and are still acting as such. At the time of its appointment of such Receivers, the court of its own motion designated John S. Partridge as counsel for the Receivers and he is still acting as such.

The order appointing the Receivers made them joint receivers of all the property of the Railway Company and directed them to take immediate possession and to protect the title and possession thereof and to continue the operation of the railway. It authorized and empowered the Receivers "to institute
"and prosecute all such suits as may be necessary in
"their judgment for the proper protection of the
"property and trust hereby vested in them, and likewise to defend such actions as may be instituted
"against them as such Receivers, and also to appear
"in and conduct the prosecution or defense of any suit
"now pending in any court against Western Pacific
"Railway Company, or any company operated by,
"for, or in the interests of said Railway Company,
"the prosecution or defense of which will, in the judgment of said Receivers, be necessary for the proper
"protection of the property placed in their charge
"for the interests and rights of the creditors connected therewith."

On the 30th day of March, 1915, the plaintiff in the suit duly filed its amended bill containing substantially the same averments as those of the original bill and praying for relief in substantially the same terms; and on the 9th day of April, 1915, the Western Pacific Company, being still the sole defendant in the suit, filed its answer admitting all the allegations of the amended bill. The prayer of the amended bill, so far as it related to the appointment of a Receiver, was:

“That a Receiver or Receivers be appointed to take possession of the railroads, property and franchises of the Defendant Railway Company, *covered by the said First Mortgage*, and the earnings, income and proceeds thereof, with power to operate the said property, and with all such powers and authority as may be required to preserve the same until the sale thereof, as the same may be decreed and ordered by this honorable court, and to secure the earnings of said railroads, property and franchises to the use of your orator and of the holders of said bonds, with such powers and authority as are usually possessed by Receivers in like cases, as this honorable court may direct.”

On the 25th day of October, 1915, Central Trust Company of New York, having, through intervention, become a party to the suit, filed its answer and cross-bill therein. This answer in the main merely put the plaintiff to proof of the facts set forth in its amended bill, but in view of the stipulation heretofore made by Central Trust Company of New York,

consenting to a decree of foreclosure and sale, as hereinafter will appear, the contents of its answer are not now material. And the contents of its cross-bill are not material further than that they show:

1. That it is the trustee under the Second Mortgage of Western Pacific Railway Company.

2. That such Second Mortgage covers all the properties of Western Pacific Railway Company, but is subject and subordinate to the First Mortgage under foreclosure in this suit.

3. That there have been issued and are outstanding under such Second Mortgage bonds aggregating in par value \$25,000,000 which bear interest at 5% per annum.

4. That under the terms of such Second Mortgage and because of the order appointing receivers of the property of the Western Pacific Railway Company, said Central Trust Company is entitled to foreclose such Second Mortgage and collect the entire amount, principal and interest, secured thereby.

On the 1st day of November, 1915, The Equitable Trust Company, as Trustee, filed its answer to such cross-bill, admitting, so far as is now material, all the averments thereof; and on the 22nd day of November, 1915, the Western Pacific Company filed its answer to such cross-bill admitting all the allegations thereof.

On the 13th day of January, 1916, the plaintiff, The

Equitable Trust Company, filed its supplemental and second amended bill. The supplemental portion consisted of averments that since the filing of the amended bill the defendant Railway Company had come into default in the payment of a second instalment of interest, due September 1, 1915; and that, because of the duration for a period of six months of the default of the Railway Company in its payment of the instalment of interest due March 1, 1915, the plaintiff, as Trustee under the mortgage and acting in accordance with its provisions, had declared the principal of the \$50,000,000 of outstanding bonds to be due, and that that principal amount also was in default.

The amendment part of the supplemental and second amended bill set forth that the Boca and Loyalton Railroad Company, Mercantile Trust Company of San Francisco, as Trustee under its First Mortgage, and Chester L. Hovey, as Receiver of the property of said Boca and Loyalton Company, appointed by a Superior Court of California in an action instituted by such trustee for the foreclosure of such Boca and Loyalton mortgage, claimed an interest in about three and three-quarters miles of track of the Western Pacific Railroad and that this interest was subsequent to and inferior to the First Mortgage of the Western Pacific Company.

On the 27th day of January, 1916, the Western Pacific Company, on the 3rd day of February, 1916, the Boca and Loyalton Company, and on the 1st day

of March, 1916, the Central Trust Company filed respectively their respective answers admitting the averments of the supplemental and second amended bill of complaint, and on the 1st day of March, 1916, the Mercantile Trust Company of San Francisco, as Trustee, and Chester L. Hovey, as Receiver, filed their respective answers thereto. The answers of these two defendants last named were limited to an assertion of a priority over the lien of the First Mortgage of Western Pacific Company of the interest of the Boca & Loyalton Company in the three and three-quarters miles of track in question.

On the 1st day of March, 1916, therefore, there was only one justiciable controversy in the cause between any of the parties to it; and that consisted of the question whether the existing right of the Boca and Loyalton Company to the railroad use jointly with the Western Pacific Company of three and three-fourths miles out of the more than eight hundred miles of the Western Pacific Railroad would survive the foreclosure of the Western Pacific Company's First Mortgage. Even that controversy was eliminated.

On the 6th day of March, 1916, at the opening of a General Term of the United States District Court for the Northern District of California, the solicitor for the plaintiff, The Equitable Trust Company, filed in the cause and submitted to the court the following stipulations:

1. A stipulation between the plaintiff and the de-

fendants Western Pacific Company and Central Trust Company waiving the right to take testimony, admitting the truth of the facts set forth in the amended bill and in the supplemental and amended bill and recited in a form for a decree for foreclosure and sale attached to the stipulation, and consenting to the entry forthwith, or at the time of such early hearing as the Court should assign, of a decree in the form annexed to the stipulation.

2. A stipulation between the plaintiff and Boca and Loyalton Railroad Company, Mercantile Trust Company of San Francisco as Trustee, and Chester L. Hovey as Receiver, that a decree of foreclosure and sale might be entered forthwith upon condition that there should be contained in such decree a provision that such sale should be made subject to all then existing rights of such defendants to a trackage right over the three and three-fourths miles of track before referred to. And the form for a decree attached to the stipulation with the Western Pacific Company and Central Trust Company then submitted to the court contained such a provision framed to the satisfaction of the Boca and Loyalton interests.

3. Stipulations by the Southern Pacific Company and the Utah Fuel Company respectively who are the only claimants against the Western Pacific Company, its property or its Receivers who have presented their claims in the cause as preferred claims, and whose

claims have not been paid, consenting to the entry of a decree of sale in accordance with the prayer of the amended bill and the supplemental and amended bill, and consenting to the setting of the cause for hearing. Probably these stipulations of creditors were not necessary because provision was made in the form for a decree submitted to the Court for all claims which may be established against the Western Pacific, its Receivers or its property.

The solicitor for the plaintiff then moved the court that a decree of foreclosure and sale in the form submitted should be entered forthwith; and, in the alternative, if that motion should be denied, that the cause be set for hearing and for the entry of such decree at such early day as the court should assign. In support of the motions, the solicitor for the plaintiff filed and submitted and read to the court two affidavits—one made by himself setting forth, among other things, that all parties or persons interested had consented that a decree of foreclosure and sale should be entered forthwith and that all creditors whose claims had been presented and allowed had been paid in full, and the other made by John F. Bowie, counsel for the Reorganization Committee of Holders of First Mortgage Bonds of the Western Pacific Company setting forth the following facts: That a Bondholders' Protective Agreement had been framed under date May 1, 1915; that on the 15th day of December, 1915, the holders of more than \$37,000,000 of such bonds had deposited

them under the Agreement and thereupon and under that date a Plan and Agreement for Reorganization had been framed under which the holders of more than \$43,000,000 of such bonds have deposited them; that in order to procure the underwriting required by such Plan and Agreement for the sale of \$20,000,000 principal amount of bonds to be issued thereunder, the Committee had procured an undertaking of certain bankers to secure an Underwriting Syndicate Agreement; that said undertaking had been performed and said Underwriting Syndicate Agreement had been made; that by the terms of the Plan and Agreement it must be declared operative before March 15, 1916; that by the terms of the Underwriting Agreement, that agreement expires July 1, 1916; that it is necessary, in order to carry out the Plan and Agreement, that the properties covered by the Western Pacific Company's First Mortgage shall be sold and all steps necessary for the enjoyment of the benefits of such Underwriting Agreement shall be taken before July 1, 1916; that if the Plan and Agreement shall be declared operative and shall fail through delay in the entry of a decree for foreclosure and sale, the bondholders who are parties to it must become liable for the sum of \$500,000 for underwriting and banking commissions over and above the sum of over \$250,000 for expenses incurred in framing the Plan and Agreement and obtaining deposits under it; that the Plan provides for the making of large extensions to the railroad out of the

funds provided to be raised by the bond issue and that if the Plan shall fail, the money can be again procured only on much less favorable terms if at all; that the continuance of the receivership is unnecessary and will involve heavy and unnecessary expense.

Copies of the Protective Agreement, the Plan and Agreement for Reorganization and the Underwriting Syndicate Agreement respectively were attached to this affidavit.

This statement has set forth all proceedings in the suit of the parties to it. It has shown that whatever controversies had arisen in the suit, as between the parties to it or any two of them, were comparatively trivial in character and had, on the 6th of March, 1916, been eliminated; and that all parties to the action were desirous of a decree of foreclosure and sale in the form submitted to the court; and that no creditors objected thereto and that the only creditors who had asserted preferred claims which had not been paid had expressly consented to the entry thereof.

PROCEEDINGS CONCERNING CONTRACT B.

The statement has not, however, referred to certain other controversies which have arisen in the cause and are still active—controversies between the court and the plaintiff, in which no other party to the suit was or is involved, and which have been injected into the suit by the court either of its own volition or upon the initiative of counsel for the Receivers. It is to these controversies, and not to any controversy be-

tween the parties to the cause in the District Court, that the attention of this Court is invited in the proceedings now before it. No party to the suit, or interested in the result of the suit, has opposed or will oppose the granting of the relief prayed by The Equitable Trust Company. The real question before this court is whether, there being no debts of the court or its Receivers to be considered, the receivership may, as a matter of right, be terminated at the request of the plaintiff, through the action of which the receivership was installed, and by consent of all parties interested.

These controversies center about what is commonly called Contract B; and at this juncture, and before taking up the procedure of the court in the matter of the motions for the making and entry of a decree of foreclosure and sale, it appears to be desirable to describe those controversies, and as clearly as possible, how they arose.

On the 18th day of May, 1915, the Receivers filed their petition asking for six months time within which to present to the court all matters and things in connection with certain contracts specifically mentioned, and any other contracts, relations or arrangements, with the Denver and Rio Grande Railroad Company. It is apparent upon the face of the petition that the Receivers merely asked for extended time, beyond that usually allowed, within which to adopt or disaffirm the contracts in question; and the

petition prayed that pending the examination by the Receivers of these contracts, they might be allowed to continue them in effect without prejudice. An order was made and entered fixing June 14, 1916, as the time for the hearing upon the petition. Among the contracts specifically mentioned in the petition was Contract B.

Contract B was entered into under date June 23, 1905, (being the same day upon which the First Mortgage of the Western Pacific Company was executed) between the Denver and Rio Grande Railroad Company (called the "Denver Company") and The Rio Grande Western Company (called the "Western Company"), as parties of the first part, Western Pacific Railway Company (called the "Pacific Company"), as party of the second part, and Bowling Green Trust Company, as Trustee under the First Mortgage of Western Pacific Railway Company (called the "Trustee"), as party of the third part. (The Equitable Trust Company of New York is the successor to Bowling Green Trust Company as Trustee under the First Mortgage of Western Pacific Railway Company; and the Denver and Rio Grande Railroad Company and The Rio Grande Western Railway Company have been consolidated into the present The Denver and Rio Grande Railroad Company.)

Contract B recites:

(a) that the Denver Company operates a railway line from Denver, Colorado, westerly to Grand Junction, Colorado, at which point it connects with a railway operated by the Western Company from Grand Junction, Colorado, westerly via Salt Lake City, Utah, to Ogden, Utah, connecting at Salt Lake City with the railway of the Pacific Company;

(b) that the Pacific Company has partially constructed, and is constructing the remainder of, a railway from San Francisco easterly to Salt Lake City, at which point the portion already constructed connects with the railway of the Western Company;

(c) that the Denver Company owns substantially all the stock of the Western Company, and the Denver Company and the Western Company, together, own a majority of the authorized stock of the Pacific Company;

(d) that there is no line of railway which furnishes an outlet for either the Denver Company or the Western Company to the Pacific Coast that is not controlled by a competitor;

(e) that the Pacific Company has authorized an issue of \$50,000,000 bonds for the purpose of completing its railway, interest upon which at five per cent. per annum is to be payable semi-annually on the first day of March and of September, and to secure the payment thereof has authorized its First Mortgage to the Trustee upon its railway property, owned or to be acquired, and by said mortgage has covenanted to create a sinking fund to consist of \$50,000 to be paid to the Trustee during the year beginning September 1, 1910, and each year thereafter until the bonds shall be wholly paid;

(f) that the Pacific Company intends to pledge its interest under this agreement under such First

Mortgage to the end that it may be enabled to sell its bonds at a higher price.

Contract B provides:

(1) that the railways owned and operated by the respective railway companies, parties to the contract, shall be operated as a joint transportation system for all purposes;

(2) that whenever the Pacific Company shall not have sufficient freight equipment to perform its part in the operation of these three railways as a joint transportation system, the Denver Company and the Western Company shall furnish such additional cars as shall be required (Art. II, par. 2);

(3) that the Pacific Company shall apply all its gross earnings and income to the payment of its operating expenses, its taxes, the interest on its bonds, its contribution to the sinking fund provided by its First Mortgage, and any other charge or expense which it may be necessary for it to pay in order to assure the continued and efficient operation of its property and to protect the priority of its First Mortgage (Art. III, par. 5);

(4) that the Denver Company and the Western Company shall purchase and pay for at par the five per cent. demand promissory notes of the Pacific Company to the amount by which in each half-year the gross earnings and income of the Pacific Company shall be insufficient to meet the sum of the payments enumerated in (3); (Art. II, par. 4 (a));

(5) that the Denver Company and the Western Company shall promptly pay the purchase price of all notes agreed to be purchased by them even though the Pacific Company shall not, at the time of such payment, have ready for delivery, or for any other reason shall fail to deliver, such notes (Art. II, par. 4 (e));

It has been claimed by the solicitor for The Equitable Trust Company in argument before the court below and will be claimed here that the contents of Contract B, as so far recited, create a complete and sufficient agreement between the Denver Company and the Western Company, on the one hand, and the Pacific Company, on the other hand; and, for convenience in the argument upon that question, that agreement will be identified as "the traffic agreement."

But there is more to Contract B than has been set forth above. It provides further:

(6) that the Denver Company and the Western Company shall pay to the Trustee, out of the purchase price of said notes, at certain times in each half-year specified,

(a) such amount as will, with the amount actually appropriated and paid over by the Pacific Company for that purpose, be sufficient to pay the interest for such current half-year upon the Pacific Company's First Mortgage bonds; and (b) such amount as will, with the amount actually appropriated and paid over by the Pacific Company for that purpose, be sufficient to meet the sinking fund payment, if any, provided by such mortgage to be made during such current half-year (Art. II, par. 4 (b));

(7) that the measure of the amount to be paid to the Trustee by the Denver Company and the Western Company as provided by (6) (a) shall be the difference between the amount necessary for the payment of a semi-annual instalment of interest on the Pacific Company's First Mortgage bonds and the sum of the amount held by the Trustee and of

the amount actually paid over by the Pacific Company to its fiscal agent for that purpose; and that the measure of the amount to be paid by the Denver Company and the Western Company as provided by (6) (b) shall be the difference between the amount necessary for the making of a sinking fund payment required to be made in the current half-year, if any, and the amount in the hands of the Trustee for that purpose (Art. VI, par. 7).

This portion of Contract B, which will be identified for convenience in argument as "the agreement of suretyship," has been claimed by the solicitor for The Equitable Trust Company in argument before the court below and will be claimed here to be a complete agreement of itself and to be wholly independent of the traffic agreement; and it has been claimed and will be claimed here that the benefits of the traffic agreement run primarily to the respective railroad companies, parties to Contract B, while the benefits of the agreement of suretyship run directly and primarily to the Trustee.

There are still other provisions in Contract B without a recital of which this statement would not be complete. It provides further:

(8) that "the pledge to the Trustee of all the rights, benefits and advantages *to which the Pacific Company may be entitled hereunder* contained in said First Mortgage of the Pacific Company is hereby assented to, ratified and confirmed" (Art. VI, par. 15);

(9) that any of the provisions of the agreement excepting those set forth in (6) may be abrogated

or modified by a written agreement of all the parties, providing it shall have the written approval of holders of outstanding bonds of the Pacific Company to the amount of two-thirds of the authorized issue thereof; but that the obligation of the Denver Company and the Western Company to make the payments provided for in (6) shall never be abrogated or modified until all of the bonds secured by the First Mortgage of the Pacific Company shall be paid in full or until they shall be called for redemption and provision made for their payment as provided in the mortgage (Art. VI, par. 14);

(10) that in the event of default by the Pacific Company under its First Mortgage the Trustee shall, upon written request of the holders of two-thirds in amount of outstanding bonds secured by the mortgage, terminate the agreement; "but such termination of this agreement shall not be deemed to and shall not release, nor shall anything else done hereunder release, the rights of the Trustee or of the holders of the First Mortgage bonds of the Pacific Company to the benefits of the agreements of the Railway Companies, parties of the first part, to make the payments" provided for in (6) (Art. VI, par. 14);

(11) that the agreement shall, unless modified or abrogated as provided in (9) and (10), endure until all the First Mortgage bonds of the Pacific Company shall be paid and shall run with the railways of the said railway companies, parties to it, into whosoever hands they may come (Art. VI, par. 13);

(12) that the refusal, neglect or other failure of the Pacific Company to perform any or all the covenants, agreements or conditions herein contained by it to be performed shall not constitute ground for the rescission of or refusal to perform or delay in performing this contract by the Denver Company and the Western Company or either of

them; but that in the event of any such refusal, neglect or failure on the part of the Pacific Company, the Denver Company and the Western Company or either of them may have resort to such remedy by suit for specific performance or action for damages as may be appropriate. But nothing in the contract contained shall be taken to authorize any action that shall have the effect of impairing in any manner or to any extent the lien of the First Mortgage of the Pacific Company or of preventing, obstructing or interfering with the exercise of any of the remedies thereby granted to the Trustee (Sec. VI, par. 10).

(13) that all amounts payable to the Trustee by the Denver Company and the Western Company for the purpose of providing for the payment of interest shall constitute a trust fund; and that the Pacific Company shall not be entitled to any interest in, or claim to, any part of it (Art. II, par. 4 (d)).

(14) that the Trustee shall, upon request of any holder of the Pacific Company's First Mortgage Bonds, enforce the provision of the contract requiring the Denver Company and the Western Company to pay it money.

CERTAIN PROVISIONS OF THE MORTGAGE.

Contract B was executed and delivered simultaneously with the execution and delivery by the Western Pacific Company of its First Mortgage now under foreclosure in the suit below.

By this mortgage the Western Pacific Company transferred and assigned to the Trustee all the property of the Company, then owned or thereafter to be

acquired, for the purpose of securing the payment of the principal and interest of its bonds to be issued thereunder and to secure the performance of its covenants therein contained. Included within this property were *the rights which the Railway Company then owned* or should acquire in Contract B, which was particularly and fully described in a granting clause of the mortgage; and, of course, the transfer and assignment by the Western Pacific Company of Contract B could be only of its own rights under the contract. The pledge to the Trustee of rights under the contract which, by the terms of the contract itself, the Trustee already fully possessed would have been utter supererogation.

The mortgage contains covenants on the part of the Company, usual in mortgages, and provides, upon default in any such covenant, for a sale by the Trustee at public auction, or for a sale under judicial proceedings, of all and singular the mortgaged property held by the Trustee

“except only the right of the Trustee and of the holders of the bonds secured hereby under said agreement between The Denver & Rio Grande Railroad Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, to require said two first named companies and each of them to make any payment or payments of money to the Trustee, and to recover damages from said companies or either of them in default of any such payment or payments, which said rights and all

rights secured by said agreement necessary for the enjoyment and enforcement of such rights shall remain in and survive to the Trustee for the benefit of the holders of the bonds secured hereby, after and despite any and every sale made by virtue of this indenture, whether under the power of sale hereby granted and conferred or pursuant to judicial proceedings" (Art. V, Sec. 3).

The mortgage provides further that, upon the completion of any sale, the Trustee shall deliver to the purchaser all agreements held by it and sold to such purchaser, with proper assignments thereof,

"provided, however, that so long as The Denver and Rio Grande Railroad Company and The Rio Grande Western Railway Company, or either of them, shall, by the terms of their said agreement with the Railway Company and the Trustee, be under obligation to make any payment or payments to the Trustee either for the purpose of providing funds wherewith to make payments of interest upon the bonds secured hereby or wherewith to make any payment into the sinking fund hereby provided for, the Trustee shall not deliver said last mentioned agreement to any such purchaser or purchasers, although such purchaser or purchasers may have succeeded to any or all the interests and rights of the Railway Company thereunder." (Art. V, Sec. 9);

and, further, that

"after any sale or sales, whether under the power of sale hereby granted or pursuant to judicial proceedings, any and all moneys that may be received by the Trustee under the provisions of said agreement between The Denver and Rio Grande Rail-

road Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, intended to provide the Trustee with moneys wherewith to pay interest upon the bonds secured hereby, shall forthwith be applied by the Trustee to the payment pro rata of the interest upon such of the bonds secured hereby as shall then remain unpaid in whole or in part whether or not the same shall have been reduced to judgment; and any and all moneys that may be received by the Trustee, after any such sale or sales, under the provisions of said agreement intended to provide the Trustee with moneys wherewith to make payments into the sinking fund hereby established shall forthwith be applied by the Trustee to the payment pro rata of the amounts remaining due for principal and interest upon the bonds secured hereby and then unpaid in whole or in part" (Art. IV, Sec. 9).

**DEPENDENT SUIT IN SOUTHERN DISTRICT OF
NEW YORK.**

On the 26th day of May, 1915, The Equitable Trust Company of New York, as Trustee, filed, in the District Court of the United States for the Southern District of New York, its bill, ancillary to the original bill theretofore filed in this cause in the court below, and obtained an ancillary order appointing Warren Olney, junior, and Frank G. Drum as Receivers of the properties of Western Pacific Railway Company in that jurisdiction. And on the following day it filed in the same court its dependent bill against The Denver and Rio Grande Railroad Company, Western Pacific Railway Company and certain

other fictitiously named defendants. This dependent bill was filed by the Equitable Trust Company as Trustee at, and in conformity to, the express request of the holders of more than a majority of the bonds outstanding and secured by such First Mortgage of the Western Pacific Company, and in performance, therefore, of the strict duty imposed upon it by the terms of its trust.

The dependent bill sets forth the suretyship agreement of the Denver Company as contained in Contract B; and the entire default of the Western Pacific Company and the Denver Company in respect of the semi-annual instalment of interest upon the First Mortgage Bonds of the Western Pacific Company due March 1, 1915; and entire default of both companies in respect of the sinking fund requirements under such First Mortgage; and that such sinking fund requirements were for the deposit with the Trustee under the First Mortgage of the sum of \$50,000 on the 1st day of September in each year, beginning with the year 1910, and aggregated at the time of filing the bill the sum of \$250,000. It set forth also that Contract B provided that the agreement of the promising railroad companies should continue in force until all the First Mortgage Bonds of the Western Pacific Company, principal and interest, should be fully paid and should run with the railroads of said railway companies. It set forth further the beginning of suits for foreclosure of the

Western Pacific Company's First Mortgage and the appointment of Receivers in the original jurisdiction of the Northern District of California and the ancillary jurisdictions of the District of Utah and the Southern District of New York; that the principal of the First Mortgage bonds would soon be declared to be due; that a sale of the mortgaged properties would, in the orderly course of procedure, be had at an early day; that it was expected that such sale would realize substantially less than the amount of bonds secured by the mortgage, principal and interest; that the Western Pacific Company was insolvent; and that recourse must therefore be had to the Denver Company for the payment of the debt.

Proceeding upon the assumption that the amount of the liability under Contract B of the Denver Company to the Mortgage Trustee might be adjudicated to be only the amount of the difference between the earnings of the Western Pacific Company and the amount necessary for interest and sinking fund requirements, the dependent bill prayed that the true meaning of the contract in respect of the sinking fund payments should be declared; that an accounting of earnings of the Western Pacific Company from the time of the creation of the First Mortgage until the time of such accounting should be had; that the amount required to be paid or to be secured to be paid by the Denver Company in fulfillment of its obligations under the contract be adjudicated; and

"That the court find and declare the true meaning, construction and effect of the said Contract B in respect of the provision that the agreement shall run with the railways of the several companies named therein, and that said provision be enforced as against defendant the New Denver Company, in accordance with its true meaning and effect thus determined by the court. That in respect to the amount found, upon the accounting and adjudication hereinbefore prayed for, to be due from the Old Denver Company either under the said Contract B or under the said guaranties, this court decree and direct the payment thereof by the New Denver Company by a short day to be named by the court; that upon the failure of the New Denver Company to make such payment accordingly, the amount thereof be by the decree of this honorable court charged upon the property of the New Denver Company, and that all and singular the property and effects of the New Denver Company be sequestrated in aid of the said decree and in order to the enforcement and satisfaction thereof. That, in the same event, a receiver or receivers be appointed by the court to take possession of the railways and other property and franchises of the defendant the New Denver Company, and the earnings, income and proceeds thereof, with power to operate the said property, and with all such powers and authority as may be required to preserve the same until the sale thereof, as the same may be decreed and ordered by this honorable court, and to secure the earnings of such railroad property and franchises to the use of your orator and of the holders of said First Mortgage Five Per Cent. Thirty Year Gold Bonds of the Western Pacific Company."

FURTHER PROCEEDINGS IN THE COURT BELOW.

Upon being advised of the filing of this dependent bill in the District Court of the United States for the Southern District of New York, the Receivers filed in the court below, on the 4th day of June, 1915, their petition for instructions in respect of Contract B. The hearing upon this petition was had upon the 9th day of June, 1915, and continued on the following day, upon which day the court, of its own volition, and without being moved thereto by anybody, directed counsel for the Receivers to prepare an order directing the Equitable Trust Company as Trustee to show cause upon a given day why the dependent suit in New York should not be dismissed or its further prosecution by the Trustee stayed until the further order of the court; and, until the return day of that order, restraining the Trust Company from taking any further step of any nature in that suit. This order was entered by the court *sua sponte* on the 11th day of June, 1915, and was made returnable June 28th, upon which day and the two following days the matter was fully argued, orally, printed briefs being thereafter submitted by counsel for the Receivers on the one hand and counsel for the Equitable Trust Company on the other, no party to the suit other than the Trust Company having appeared in the matter. The decision of the court upon its order to show cause was rendered upon the 21st day

of February, 1916; and was, not only that the Equitable Trust Company should be enjoined from further proceeding with its dependent suit in New York and from bringing any further action or proceeding involving Contract B and from taking any other steps which might impair or affect the obligations or any of the provisions of the contract without first procuring the sanction of the court, but also that the Denver and Rio Grande Railroad Company and Missouri Pacific Railway Company be made parties to the suit and compelled respectively to interplead and respectively to set up any rights which they might have in the suit. An order to this effect was thereupon duly entered in the cause.

It is from that part of this order which enjoins The Equitable Trust Company of New York that the appeal now before this court is directed; and it is from that part of this order which directs that the Denver and Rio Grande Railroad Company and the Missouri Pacific Railroad Company be made parties to the suit and be compelled to interplead therein that the Application for a Writ of Prohibition now before this court is directed.

It should be added that no bondholder has ever demanded or requested that The Equitable Trust Company to pursue any other course than that which it has followed. No bondholder has ever requested or demanded that it should not follow the course which it has sought to follow.

PROCEDURE OF THE COURT UPON THE MOTION
TO ENTER A DECREE.

To return to the proceedings of the court below upon the motion made by the solicitor for the Equitable Trust Company, upon the stipulation of all parties to the cause, for the entry forthwith of a decree in the form then submitted to the court, or, in the alternative, if that motion should be denied, that the cause be set for hearing and for the entry of such decree at such early day as the court should assign. In view of the stipulations which have been described, it is obvious that the motion did not meet objection from any party to the cause. It did, however, meet with objection by counsel for the Receivers, who, over the protest and objection of the solicitor for the Trust Company, was allowed to interpose an objection to the granting of the motion and, over like protest and objection, was allowed to adduce evidence and make argument in support of such objection. After some evidence, all of which had been duly objected to by the solicitor for the Trust Company, had been introduced by counsel for the Receivers, the court, likewise over the objection of the solicitor for the Trust Company and over the objection of such solicitor to the refusal of the court to act promptly upon the motion, and notwithstanding the assertion of such solicitor that such Trust Company was entitled to the granting of such motion as a matter of right, refused to grant such motion and,

of its own accord and without the motion of anybody so to do, continued the hearing to the 13th day of March, 1916, for the purpose of affording counsel for the Receivers further opportunity for the introduction of evidence and the making of argument in support of his objection to the granting of such motion.

It is to the refusal of the court to grant such motion and to enter such decree promptly that the Application for a Writ of Mandamus now before this court is directed.

ARGUMENTS IN THE COURT BELOW.

The only extended argument in the court below has been upon the return to the Order to Show Cause issued to the Equitable Company. In that argument counsel for the Receivers covered a wide range. Over one-third, however, of an argument covering about one hundred and thirty pages was devoted to the proposition that "The First Mortgage of Deed of Trust of the Western Pacific by virtue of the pledge of Contract B amount to an equitable lien upon the properties of the Denver and Rio Grande, and the bill in this case is sufficient to establish and, if necessary, foreclose that lien." But their entire argument rested upon two untenable assumptions:—first, that Contract B is wholly a contract between the Western Pacific Company and the Denver Company; and that the moneys provided to be paid

by the Denver Company to the Trustee to supply the deficiency in interest and sinking fund requirements are assets of the receivership for which the Trustee is a mere "collection agent"; and, second, that the agreement by the Denver Company to pay money to the Trustee to supply such deficiency was pledged under the mortgage and is now in the custody of the court by its Receivers.

The argument for the Trust Company was that the right sought to be asserted by the Trust Company in its dependent suit in New York was not covered by the lien of the mortgage; and that the enforcement of that right would not in any manner affect the title, possession or control of the property in the possession of the court in this suit.

Because there was no motion before the court that either the Denver Company or the Missouri Pacific Company be made parties to the suit, no attention was paid by counsel for the Trust Company to the argument of counsel for the Receivers on the point that the Denver Company is an indispensable party.

MURRAY, PRENTICE &
HOWLAND,
JARED HOW,
Attorneys for Equitable Trust Company
of New York, as Trustee.

No.....

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IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

Ex parte Equitable Trust Company of
New York, Original No. 169.

2755

In the Matter of the Petition of The
Equitable Trust Company of New York,
as Trustee, for a Writ of Mandamus,
Original No. 2757.

2756

In the Matter of the Appeal of The
Equitable Trust Company from the
Order Issuing the Injunction, dated
February 21, 1915.

2757

Brief of Petitioners and Appellants.

MURRAY, PRENTICE & HOWLAND,
JARED HOW,
W. E. S. GRISWOLD,
Attorneys for Equitable Trust Company
of New York.

E. W. M. CUTCHEON,
JOHN F. BOWIE,
Amici Curiae.

Filed

Filed this.....day of March, 1916.

MAR 20 1916

F. D. MONCKTON, Clerk.

F. D. Monckton

By....., Deputy.

No.....

IN THE

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February 21, 1915.

BRIEF OF PETITIONERS AND APPELLANTS.

SUMMARY OF QUESTIONS OF LAW.

The primary questions of law involved in these proceedings are:

(1) Can a court whose jurisdiction has been invoked for the purpose of obtaining a decree fore-

closing a mortgage, both principal and interest of the debt being due, refuse to proceed with the foreclosure suit, though all parties request a decree, until the liability of a guarantor who has undertaken to pay interest is determined?

(2) Can this Court, acting on its own motion, against the wishes of all parties, direct that the guarantor be made a party to the foreclosure proceeding, and require that the liability of the guarantor be therein ascertained prior to making a decree of foreclosure?

(3) Assuming that a chose in action forms part of the assets pledged to secure a mortgage (and this is our opponent's claim, and is not the fact), can the court whose jurisdiction is invoked solely for the purpose of foreclosure, refuse to sell the property mortgaged and pledged until its receiver has by judicial proceeding attempted to realize upon the choses in action?

STATEMENT OF FACTS.

Under date of June 23, 1905, the Denver and Rio Grande Railroad Company and the Rio Grande Western Railroad Company (since consolidated as the Denver & Rio Grande Railroad Company of Colorado and Utah, and hereafter referred to as the Denver Company), as parties of the first part; the Western Pacific Railway, as party of the second part, and the Bowling Green Trust Company, as trustee of

the First Mortgage of the Western Pacific Railway, as party of the third part, entered into two contracts, referred to for convenience as Contracts "A" and "B".

CONTRACT "A".

This Contract recites:

(a) The virtual ownership of the Western Pacific Railway by the Denver Company.

(b) The desire of the Denver Company to afford credit essential to enable the Western Pacific Company to sell its First Mortgage Bonds, and construct its road.

To accomplish this end the Denver Company covenants to purchase at 75 Second Mortgage Bonds of the Western Pacific to the principal amount of \$25,000,000, if the proceeds of such sale be necessary to provide funds for the construction of the Western Pacific Railway.

This Contract has been fully performed.

CONTRACT "B".

This Contract contains substantially the same recitals as Contract "A", but the covenants were as follows:

(a) That the respective Railroads should be operated as a joint transportation system, each giving to and handling for the other all business within its power.

(b) A covenant by the Denver Company to lease equipment to the Western Pacific Company.

(c) The grant of a right to the Denver Company by which a through passenger train could be operated between Denver and San Francisco.

These provisions are termed for convenience the traffic features of Contract "B". The financial features were as follows:

(a) A covenant by the Denver Company to pay semi-annually to the trustee of the First Mortgage of the Western Pacific Company prior to the maturity of the interest coupons *a sum which, added to the moneys then in the hands of the Fiscal Agents of the Pacific Company, should equal the amount necessary to pay the coupons maturing.*

(b) A covenant by the Denver Company to pay to the trustee, prior to the maturity of each sinking fund payment to be made, *a sum which, when added to the sinking fund payments actually made by the Pacific Company, should equal the amount required by the mortgage.*

In addition to the contract of suretyship above set forth, the Contract provided for the convenient accomplishment of the same object by obligating the Denver Company to *loan* to the *Western Pacific*

Company on its unsecured promissory notes moneys sufficient, together with the earnings of that road, to pay taxes, maintenance and interest and sinking fund requirements under the First Mortgage.

The traffic rights assured to the Denver Company by the traffic features above mentioned were among the inducements which led that Company to undertake the enterprise. But as every right accorded to the Denver Company under these provisions could easily have been obtained through its stock control of the Pacific Company or by subsequent contract, it is obvious that the reason for including these provisions in the contract was that of assuring the Pacific Company bondholders an outlet for that road east of Salt Lake City. Such an outlet might be of the utmost importance to the Pacific Company. Accordingly, it was provided for in this contract. *But inasmuch as the provisions for interchange might become undesirable, Contract "B" provided that in the event of default by the Pacific Company in the payment of principal or interest, or the performance of any of the covenants of the deed of trust securing the First Mortgage Bonds, every provision of Contract "B", except the provision whereby the Denver Company assumed the obligations of suretyship so far as concerned the payment of interest and the making of sinking fund payments to the Trustee, could and should*

be terminated by the Trustee on request of the holders of two-thirds in amount of the bonds.

Sec. 14, Art. VI, Contract "B."

ESSENTIAL PROVISIONS OF CONTRACT B.

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The Trustee covenants and agrees that it will, from time to time, upon the request of any holder or holders of bonds secured by said First Mortgage of the Pacific Company and being satisfactorily indemnified against the expense of so doing, acting either alone or with the Pacific Company, take steps to enforce by a suit or suits in equity or at law or by other proper proceedings to be prosecuted or taken in its own name or in the name of the Pacific Company, or in the name of both, all the terms and provisions of Article II hereof that require any payments to be made to the Trustee by the parties of the first part or either of them, and, upon the request of the holder or holders of twenty per cent (20%), in amount of said bonds at the time being outstanding, will likewise enforce any and all other provisions of this agreement, and likewise of all modified agreements, if any, substituted therefor, as provided in Section 14 of Article VI hereof.

Art. V.

obligation of
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pay to
trustee.

The amount of moneys to be paid to the Trustee by the parties of the first part, and to be applicable to the payment of such interest, as provided in Section 4 of Article II hereof, shall be equal to the difference between the amount so required, less the amount so held by the Trustee, and such sum as shall at the date of such notice actually have been paid by the Pacific Company to its fiscal agent or

fiscal agents for the purpose of making such payment of interest;

Sec. 7, Art. VI.

4. (a) The Denver Company and the Western Company, parties of the first part aforesaid, jointly and severally covenant and agree to purchase semi-annually, beginning with the date hereof except as otherwise expressly stated, and to pay therefor, dollar for dollar in cash, at the dates and in the manner hereinafter provided, promissory notes of the Pacific Company, bearing interest at the rate of five per cent. (5%) per annum and payable upon demand, to the amount face value, by which the gross earnings and income of the Pacific Company during the preceding fiscal half year shall be insufficient to meet the sum of the following:

Obligation of
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to W. P. Co.

(1) Its operating expense, including rentals payable under leases and, particularly, any lease of terminals at Salt Lake City, also current payments upon claims for damages to persons or property, and its ordinary, including all necessary, expenses of maintenance;

(2) Its taxes, including all assessments and other governmental charges against it or that may become a lien upon any of its property;

(3) From and after the first day of September, 1908, or the earlier acquisition and completion of the Pacific Company's main line of railroad from San Francisco to Salt Lake City, all interest falling due during the then current calendar half year upon the Pacific Company's Fifty million dollars (\$50,000,000), face value, of First Mortgage Five Per Cent. Thirty-Year Gold Bonds;

(4) The Pacific Company's annual contribution to the sinking fund provided for in its said First Mortgage, if the same be payable during the then current calendar half year;

(5) Any other charge or expense that it may be necessary that the Pacific Company shall pay, in order to assure the continued and efficient operation of its property and to protect unimpaired the lien and priority of its said First Mortgage;

(6) Any tax or taxes which the Pacific Company may be required by law or permitted to pay upon or deduct from the principal or interest of its said First Mortgage bonds, so that the holders of such bonds shall, under all circumstances, receive the principal and interest thereof without deduction for any tax or taxes;

(7) All interest for such current calendar half year upon all indebtedness of the Pacific Company, other than its said First Mortgage bonds.

Sec. 4, Art. II.

Neither the Pacific Company nor any one claiming under it, save only such persons or corporations as may be entitled to receive the interest upon said First Mortgage Bonds, shall be entitled to or possess any interest in, lien upon or claim to said fund, or any part thereof.

Sub A, Sec. 4, Art. II.

1. So far as the same lawfully may be done, the parties of the first part and each of them will give and turn over or cause to be given and turned over to the Pacific Company all such west-bound traffic of every description controlled by them, or either of them, whether originating on or passing over any of their lines, or any of the lines of either of them, or otherwise so controlled, as shall be destined to any point or points upon or that can be reached with reasonable convenience

by or via any line or lines of the Pacific Company, or any part or branch thereof, whether alone or in conjunction with other lines of railway; and will cause all east-bound traffic of every description, which shall originate in territory in any way tributary to, or which with reasonable convenience may be forwarded over, any line of the Pacific Company and destined to any point or points upon, or that can be reached by or via any line or lines of the Pacific Company, whether alone or in conjunction with other lines of railway, and which is within their control, or the control of either of them, to be delivered to the Pacific Company, for transportation to as great an extent as any of its lines are available for that purpose, and that so far as practicable their lines of railway and the lines of railway of each of them shall be operated with the lines of railway of the Pacific Company as a joint transportation system for all transportation purposes.

Each of the parties of the first part will receive and promptly transport to its destination or over its line and deliver to the connecting carrier all east-bound freight routed over its line and tendered to the Western Company by the Pacific Company.

Sec. 1, Art. II.

Section 10 of Article VI provides:

“The refusal, neglect or other failure of the Pacific Company to perform any or all of the covenants, agreements or conditions herein contained by it to be performed shall not constitute ground for the rescission of or refusal to perform or delay in performing this contract by the parties of the first part, or either of them; but in event of any such refusal, neglect or other failure, the party or parties

Severable
character of
covenants.

of the first part aggrieved thereby may have resort to such remedy by suit for specific performance or action for damages as may be appropriate."

Section 13 of Article VI provides:

"This agreement shall, except as hereinafter provided, continue in full force and effect, and be binding upon all the parties hereto, from the date hereof until all of said \$50,000,000, face value, of First Mortgage Five Per Cent. Thirty Year Gold Bonds of the Pacific Company shall be fully paid, principal and interest, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided in the First Mortgage of the Pacific Company, and shall run with the railways of the said several Railway Companies, parties hereto, into whosoever hands the same may come."

Section 14 of Article VI provides:

"Notwithstanding anything herein contained or anything contained in said First Mortgage of the Pacific Company, neither the obligation of the parties of the first part nor the obligation of either of them to make any of the payments provided for in paragraphs 4 and 5 of Article II of this agreement, as and at the times herein provided, shall be abrogated or in any manner modified until all of the bonds secured by the Pacific Company's First Mortgage shall be fully paid, principal and interest, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided for in the First Mortgage of the Pacific Company."

Life of obligation and provision declaring the same shall run with land.

Covenant to survive foreclosure.

"In case the Pacific Company, or any of its successors or assigns, shall make default in the payment of the principal of or interest agreed to be paid upon its bonds to be issued under its said First Mortgage, according to the tenor and effect of said bonds and the interest coupons pertaining thereto, or in event of any default in the covenants or conditions of said First Mortgage whereby a right of foreclosure shall thereunder accrue to the Trustee or the holders of the bonds secured thereby, *the Trustee shall have and shall forthwith become vested with the right, upon the written request of the holders of two-thirds in amount of the bonds outstanding and secured by said mortgage executed and authenticated in the manner aforesaid, to, and upon any such request, the Trustee SHALL TERMINATE this agreement (save and excepting always the provisions for payments of interest, sinking fund contributions and taxes contained in paragraphs 4 and 5 of Article II hereof).*"

Right of bondholder on default to terminate all provisions except those requiring payment of interest and sinking fund to Trustee.

Section 14 continues:

"but such termination of this agreement shall not be deemed to and shall not release, nor shall anything else done hereunder release, the rights of the Trustee or of the holders of the First Mortgage Bonds of the Pacific Company to the benefits of the agreements of the Railway Companies, parties of the first part, to make the payments provided for in paragraphs 4 and 5 of Article II hereof, or upon or against any fund derived or constituted as provided in any of said paragraphs. Nothing herein contained shall be taken to authorize or to result in the termination of this agreement in any event or contingency (prior to the payment or provision for payment of all of said First Mortgage Bonds, principal and interest, as aforesaid), except upon

Provision continuing obligation to pay interest and sinking fund to Trustee after termination of other provisions.

the election of the Trustee made with the written approval of the holders of two-thirds in amount of the outstanding bonds secured by the Pacific Company's First Mortgage given and evidenced in manner and form as above provided; but, on the contrary, at all times prior to such termination thereof, whether before or after default as aforesaid, the Trustee as well as the Pacific Company, its successors and assigns, shall be entitled to specific performance of the same and of any agreement substituted therefor and to enforce the same by suits in equity or actions at law or otherwise, as may be appropriate."

The rights of the Western Pacific Company, *not those of the trustee*, were pledged under the First Mortgage of the Western Pacific Company, and this Mortgage, executed on the same day as Contracts "A" and "B," was drawn in contemplation of the execution of these agreements, and provided that the obligations of the Denver Company as surety should not be sold on foreclosure, but should survive to the Trustee. Thus the Mortgage provided for a sale of the property of the mortgagor *excepting*

"the right of the Trustee and of the holders of the bonds secured hereby under said agreement between The Denver and Rio Grande Railroad Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, to require said two first named companies and each of them to make any payment or payments of money to the Trustee, and to recover damages from said companies or either of them in default of any such payment or payments, which said rights and all rights secured by

Right to require payment of interest in spite of default and sale survives to Trustee.

said agreement necessary for the enjoyment and enforcement of such rights shall remain in and survive to the Trustee for the benefit of the holders of the bonds secured hereby, after and despite any and every sale made by virtue of this indenture, whether under the power of sale hereby granted and conferred or pursuant to judicial proceedings."

Sec. 3, Art. V, First Mortgage.

The Mortgage further provided:

"The Trustee shall hold all moneys received by it pursuant to the provisions of said agreement between the Denver and Rio Grande Railroad Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, prior to any sale of the mortgaged and pledged premises and property, whether made under the power of sale hereby granted or pursuant to judicial proceedings, in trust for, and will apply the same and cause the same to be applied, at the times and in the manner therein provided, to the uses and purposes therein prescribed with respect of such moneys; provided, however, that any moneys paid to the Trustee under the provisions of said agreement and prior to any such sale, for the benefit of the sinking fund provided for in this mortgage, shall be held, invested and disposed of in accordance with the provisions concerning the establishment, investment and disposition of the sinking fund contained in Article VIII hereof. After any sale or sales, whether under the power of sale hereby granted or pursuant to judicial proceedings, any and all moneys that may be received by the Trustee under the provisions of said agreement between The Denver and Rio Grande Railroad Company, The

Provision for payment of moneys collected on Contract B after default or sale.

Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, intended to provide the Trustee with moneys wherewith to pay interest upon the bonds secured hereby, shall forthwith be applied by the Trustee to the payment pro rata of the interest upon such of the bonds secured hereby as shall then remain unpaid in whole or in part whether or not the same shall have been reduced to judgment; and any and all moneys that may be received by the Trustee, after any such sale or sales, under the provisions of said agreement intended to provide the Trustee with moneys wherewith to make payments into the sinking fund hereby established shall forthwith be applied by the Trustee to the payment pro rata of the amounts remaining due for principal and interest upon the bonds secured hereby and then unpaid in whole or in part. The amount so payable shall in each case be paid only upon presentation of the bond or bonds and coupons (in the case of coupon bonds) whereon the same is to be paid and the amount of such payment shall be endorsed thereon."

Sec. 9, Art. IV (pp. 62-1), First Mortgage.

Section 11, Art. V, of the Deed of Trust, provides:

"In case of sale of the mortgaged and pledged premises and property or any part thereof, the purchaser in settlement or payment for the property purchased shall be entitled to use and apply towards payment of the purchase price of the property purchased any bonds and any matured and unpaid interest and coupons hereby secured, by presenting such bonds and coupons (in the case of coupon bonds) so that there may be credited and endorsed or stamped as paid thereon the sums

applicable to such payment out of the net proceeds of such sale as provided in Section 10 of this article; and such purchaser shall thereupon be credited on account of the purchase price payable by him with the sums so applicable and credited on the bonds and coupons so presented. *Such bonds and coupons so presented by the purchaser shall be deemed to be paid only to the extent of the amounts so credited as paid thereon."*

The Mortgage also contained an unusually strong clause giving to a majority of the bondholders the right to control the Trustee in the exercise of the powers conferred upon it. The majority was also accorded the right to require the Trustee to declare due the principal debt in the event that an interest default continued for the period of six months.

Section 12 of Art. V of the Mortgage provided:

"anything in this indenture contained to the contrary notwithstanding, the holders of a majority in amount of the bonds hereby secured and outstanding shall have the right from time to time, if they so elect and manifest such election by an instrument in writing executed and delivered to the Trustee, to direct and control the method of conducting any and all proceedings for any sale of the premises and property hereby conveyed, mortgaged and pledged, or for the foreclosure of this indenture or for the appointment of a receiver or for any other action or proceeding hereunder, and for such purpose to instruct the Trustee to exercise its right of election to declare said bonds due or to waive the exercise of the same, or if exercised, to annul the same, or to institute, continue or discontinue any proceedings hereunder."

Provision for
majority
control.

Direct guaranty
endorsed on
some bonds.

In addition to these provisions, and pursuant to an agreement with the underwriters, and in order to obtain a more ready market for the Western Pacific bonds, the Denver Company endorsed on any bond, when such endorsement was requested, a direct guaranty for the payment of interest. This guaranty was endorsed on bonds in the principal amount of \$36,812,000.

SUMMARY OF CONTRACTS.

As a result of these various contracts, the bondholders of the Western Pacific Company could, in event of default, adopt various courses.

If the default occurred in the payment of interest, they could:

(1) Sue the Denver Company without proceedings to foreclose, suit being based upon Contract "B."

(2) Sue to foreclose for interest without suing the Denver.

(3) They could, if they desired, adopt both courses.

If interest remained unpaid for a period of six months, they could:

(1) Declare the principal due and sue to foreclose for both principal and interest.

(2) After such foreclosure, they could prosecute an action against the Denver Company on the con-

tract of suretyship, insofar as the principal debt remained unpaid after application of the proceeds of the sale.

We desire also to emphasize at this point that there is vested in the bondholders the right to have the property of the Western Pacific sold, *and that part of this property is the traffic feature of Contract "B," assuring, as it does, an outlet to the east from Salt Lake City.*

On the other hand, it is equally the right of the bondholders, if the holders of two-thirds in principal amount see fit to sanction that course, to terminate the traffic features of Contract "B" and sell the road free and clear of all traffic rights and obligations. *These rights are a part, and a very essential part, of the security. These rights so created are not dependent on the action of the Court but arise from the instruments themselves and form inherent limitations on the subject-matter over which the jurisdiction of the Court is exercised.*

On March 1, 1915, the Western Pacific Company defaulted in payment of interest, and the Denver Company failed to perform the obligations it assumed under Contract "B." The Trustee promptly brought suit to foreclose for non-payment of interest. In this suit it prayed:

"That a receiver may be appointed to take possession of and to operate the properties of defendant which are subject to the lien of such First Mortgage, and to collect and receive the tolls, earn-

ings, revenue, rents, issues, profits and other income thereof, and to apply the net income thereof to the benefit of the holders of bonds secured by such First Mortgage as provided by the terms thereof, and with such other powers and authority and limitations of power and authority as to this Honorable Court shall seem proper."

A few days thereafter an order was made appointing receivers, the terms of the order being:

"on motion of the plaintiff by Jared How, its solicitor, the defendant not objecting thereto, it is

Ordered, Adjudged and Decreed, that Warren Olney, Junior, of Berkeley, California, and Frank G. Drum, of San Francisco, California, be and they are hereby appointed joint receivers of all and singular the property of the defendant, Western Pacific Railway Company, including the railway line now being operated by said Company, and all other property, real, personal, and mixed, of whatsoever kind and description, and wherever situated, whether described in the bill of complaint or not, including all equipment, cars, and other rolling stock, machinery, tools, materials, shops, coal yards, fixtures, coal on hand and supplies now owned, held or in the possession and use of said corporation, and wherever situated and including all tracks, terminal facilities, real estate, warehouses, offices, stations, and all other buildings of every kind, owned, held, or possessed by said Company, together with all telegraph lines and the appurtenances thereto, and also all moneys, books of account, contracts of every kind, debts, things in action, bonds, stocks, securities, deeds, leases, leasehold interests, beneficial muniments of title, bills receivable, rents, and income of premises accruing

and to accrue, as well as all franchises, easements, rights and privileges of said Western Pacific Railway Company."

The Receivers were given the usual powers.

FACTS SHOWN BY THE AFFIDAVIT OF MR. CUTCHEON.

Upon May 1, 1915, the bondholders formed a Protective Committee, and June, 1915, there had been deposited under the agreement bonds in the principal amount of over \$25,000,000. And with this Committee there was then, and now is, co-operating a Dutch Committee, holding \$2,500,000 of bonds. The condition of the Denver Company at this time was as follows:

At the time the Denver Company undertook the construction of the Western Pacific, that road had an outstanding debt, secured by mortgage, amounting to over \$80,000,000. It had since that date been called upon to purchase Second Mortgage bonds of the Western Pacific, and had paid therefor \$18,750,000. It had also been called upon to perform the obligations assumed by Contract "B," and in one way and another, in responding to the obligations assumed by Contracts "A" and "B," had paid out to or on account of the Western Pacific Company about \$16,408,000 in addition to the purchase price of the Second Mortgage bonds. As a result of this, and of its own necessities, its mortgage debt had increased to \$43,000,000. These bonds being secured by two dif-

ferent mortgages, one the Refunding Mortgage which secured outstanding bonds in the principal amount of \$33,000,000; the other the Adjustment Mortgage which secured bonds in the principal amount of \$10,000,000.

Both of these Mortgages were made after the Western Pacific enterprise had been undertaken, and the Adjustment Mortgage contained a clause by which a default in the performance by the Western Pacific of its obligations under its Mortgage was a default authorizing the foreclosure of the Adjustment Mortgage itself.

In any action prosecuted to judgment by the Trustee for the Western Pacific bondholders against the Denver Company there will be presented for decision the question whether the financial provisions of Contract "B" are an equitable charge on the assets of the Denver Company superior to the lien of the adjustment and refunding bonds.

Prior to the institution of the suit to foreclose the First Mortgage of the Western Pacific Company, the financial situation of the surety of the Western Pacific was by no means all that could be desired, for the Denver was burdened with a secured debt in the principal amount of \$123,000,000, and of this sum the last \$10,000,000 was in default and subject to foreclosure, at the election of the bondholders. The Denver was also in need of money for betterments and capital expenditures, \$25,000,000 being the amount required as estimated by competent engineers.

The net earnings of the Denver had, however, always exceeded its fixed charges, and in the year ending June 30, 1914, that road earned \$1,055,000 in excess of bond interest and sinking funds. This was one of the worst years in the history of the Denver Company. In that same year the earnings of the Western Pacific Company amounted only to \$321,506. So the earnings of both companies were hardly sufficient to meet one-half the interest accruing on the First Mortgage bonds of the Western Pacific Company.

At this time certain bondholders of the Western Pacific, holding bonds of the Western Pacific with the interest guaranty of the Denver Company endorsed thereon, commenced suit against the Denver Company. It was obvious that if any substantial number of these suits were commenced and pressed, the Denver would be forced to the wall, and the creditors obtaining the earliest judgments might make a slight profit, to the great cost and irreparable detriment of other bondholders.

Under these conditions the Bondholders' Committee requested the Trustee to commence an action upon Contract "B," and obtain an order enjoining the prosecution of separate suits, the object being to control the actions against the Denver, and not to permit them to be forced, to the injury of all.

See affidavit of Cutcheon, Exhibit No. 21, Application for Writ of Prohibition.

It was then contended and has since been held that in a transitory action jurisdiction in the Northern District of California could not be obtained over the Denver Company. (See *Fry v. Denver Co.*, 226 Fed., 893), and a foreclosure bill ancillary to that pending in this District had been commenced in New York, and the same receivers appointed. As various citizens of New York were about to sue the Denver, the suit on Contract "B" was commenced as a dependent suit in New York, the bill being filed as a dependent bill in order to obviate objections to jurisdiction based on the fact that parties on both sides were residents of the same State.

When the fact that the dependent bill had been filed in New York came to the attention of the Court, it issued an order restraining the prosecution of that suit, even to the extent of enjoining the plaintiff from procuring an injunction against individual bondholders suing the Denver Company and requiring the plaintiff to show cause why it should not dismiss that suit or be enjoined from further proceedings in it. This it did upon its own motion. A hearing was had upon the order to show cause, and the question submitted, the restraining order being kept in force.

In December, 1915, over \$37,000,000 of bonds having been deposited with the Protective Committee, the holders elected to declare due the principal of their debt secured by the First Mortgage. The earnings of the Western Pacific Company for the year 1915

had amounted to but \$617,258.44. And in November 1915, the Central Trust Company of New York, as Trustee of the Second Mortgage, had filed a cross-bill in the action for the foreclosure of that Mortgage, which was then in default, there then being approximately \$8,200,000 interest accumulated and unpaid thereon.

Accordingly, a supplemental and amended bill was filed, seeking foreclosure and sale for payment of principal and interest.

In December, 1915, over two-thirds of the bonds being deposited with the Protective Committee, a plan of reorganization was formulated. This plan provided for the acquisition of the property by the depositing bondholders on a prompt foreclosure sale; transfer of the property to a California corporation for the purpose of operation; and a transfer of the stock of this corporation to a holding company, the stock of which should be distributed to bondholders. Provision was made for the issuance and sale at 90 of bonds of the operating company, with a certain percentage of stock in the holding company. The present bondholders were accorded the first right to purchase bonds, those not taken by the bondholders being underwritten, the amount payable for underwriting being $2\frac{1}{2}\%$, or \$500,000. By the Plan the rights of the depositing bondholders against the Denver Company arising under Contract "B" were transferred to the holding company, and provision made for the protection of

these rights against loss through foreclosure of the Adjustment Mortgage. Obviously no provision was made with regard to the rights of non-depositing bondholders against the Denver Company; and obviously none could be made. Any assertions that the plan affected the rights of any non-depositing bondholder against the Denver Company is made either maliciously or without understanding. And any claim that through failure to make the Trustees under the Denver mortgages parties to the suit in New York against the Denver Company is a surrender of any claim of priority over those mortgages for any lien in favor of the Western Pacific bondholders against the property of the Denver Company is absurd.

Under this plan bonds aggregating the principal amount of \$43,900,000 have been deposited, and co-operating with this Reorganization Committee is a Dutch Committee, holding bonds in the principal amount of \$2,500,000.

The underwriting procured pursuant to the Plan expires July 1, 1916, at which date the Syndicate expires, and as a result securities must be ready for delivery before that date if the benefits of that underwriting are to be availed of.

All parties were anxious and willing to have a decree of foreclosure made at the earliest possible date, and were proceeding to that end, when, on February 21, 1916, the Court made an order directing that the Denver & Rio Grande and Missouri Pacific Railway

be made parties to the action. This order was made by the Court on its own motion, and was as follows:

“Let an order be entered that the said plaintiff, The Equitable Trust Company of New York, be enjoined and restrained from further proceeding with said ancillary and dependent suit in Equity, numbered E 12-287, in the United States District Court for the Southern District of New York and be enjoined and restrained from bringing any further action or proceeding involving said Contract “B” in any jurisdiction other than this Court, and from taking any other steps which may, in anywise impair or affect the obligations of said contract or any of its provisions, without first procuring the sanction of this Court; and further,

That the Denver and Rio Grande Railroad Company be made a party to this action and that such proceedings may be taken as may be necessary to make the said the Denver & Rio Grande Railroad Company a party to this action, and compel it to interplead herein and to set up any and all rights it may have or claim against the defendant herein, under the mortgage or deed of trust in this action or any of the contracts pledged therein, or otherwise; and,

That the Missouri Pacific Railway Company be made a party to this action and that such proceedings may be had and taken as may be necessary to make the said Missouri Pacific Railway Company a party to this action and to compel it to inter-plead herein and set up any rights it may have herein;”

At the same time the Court made an order enjoining the prosecution of the suit on Contract “B” initiated in New York.

On March 6, 1916, the first day in the General

Term beginning on that day on which a motion to set equity causes could be heard, there was presented to the Court stipulations of all parties to the suit consenting to the setting of the cause forthwith, and stipulations consenting to the entry forthwith, or at the earliest possible date, of a decree of foreclosure. Affidavits showing the urgent necessity of immediate action were read. The Court refused either to set the case or give the decree, but continued the matter one week to allow the Receivers to make a showing in opposition. The following colloquy took place between Court and counsel:

THE COURT—The Court cannot say what its attitude would be. The order was made directing that a proper proceeding be had to bring them before this Court. Of course, they are not foreclosed from coming here and objecting to the jurisdiction of the Court. That has to be determined, too. The Court may find it has not jurisdiction; I do not think it will, but still it might. The judgment that I have formed is not infallible. If it has jurisdiction, Mr. How, I think the Court has intimated sufficiently throughout the long argument that was had, and the discussion of that order to show cause, and what it says in its opinion as well, that in its view there can be no competent marshaling or fixing of the value of this property for the purposes of sale, for the essential purpose of fixing an up-set price, without construing the extent and character of the guarantee given in that contract by the Denver & Rio Grande, because if that contract carries a right of protection to the extent that is contended on one side that it does, it might

never be necessary to sell the property of the Western Pacific. . . .

MR. PARTRIDGE—I was going to say further, your Honor, that the reason, and the only reason, why the Receivers want to be heard, or to object to the application of Mr. How here to-day, is this: That they believe that this guarantee of The Denver & Rio Grande Railroad is a mortgage upon its property, that that mortgage is prior and superior to its first and refunding Fives, and to its adjustment Sevens, and that that can be established thoroughly in this Court; in other words, that it can be established in this Court with the proper parties before it, that that lien is superior to the lien of those two interests in the amount of \$43,000,000. Furthermore, if that can be established in this Court by the Receivers, or the Equitable Trust Company, that that, together with the earnings of the Western Pacific, will more than be sufficient to pay the full interest on the bonds of the Western Pacific, \$50,000,000 par, and the sinking fund besides. * * * *

THE COURT—Of course, Mr. How, it cannot be decided until it is submitted, and as I suggested, I doubt if you will get any ruling upon this application until the Circuit Court of Appeals has advised this Court as to whether or not it is correct in the attitude it has taken.

MR. HOW—I think I ought to object again and protest against the Court's granting any continuance at the request of counsel or for the convenience of counsel for the Receivers.

THE COURT—The Court is doing it for its own protection and on its own motion and for its own enlightenment. It is bound to have enlightenment to enable it to see where the requested step is leading the Court insofar as the protection of the parties whose rights are involved here are con-

cerned. You will always find me ready to decide when I have the proper basis for it, but I cannot be coerced into deciding things that do not jump with my own judgment simply because of the magnitude of the interests behind them. Let the matter go over then until next Monday and I will give you until then to make such response to this application as you may be advised, and for the advice and aid of the Court, and such further showing as may be deemed necessary.

MR. HOW—I should like to take an exception to that ruling of the Court and to the failure of the Court to act promptly in the matter.

THE COURT—Yes.

There are thus presented on the proceedings before this Court three questions:

1. Had the lower Court power of its own motion to order:

That the Denver and Rio Grande Railroad Company be made a party to this action and that such proceedings may be taken as may be necessary to make the said the Denver & Rio Grande Railroad Company a party to this action, and compel it to interplead herein and to set up any and all rights it may have or claim against the defendant herein, under the mortgage or deed of trust in this action or any of the contracts pledged therein, or otherwise; and

That the Missouri Pacific Railway Company be made a party to this action and that such proceedings may be had and taken as may be necessary to make the said Missouri Pacific Railway Company a party to this action and to compel it to interplead herein and set up any rights it may have herein?

This question arises on the proceedings for prohibition.

2. Did the Court err in restraining proceedings before the United States District Court, for the Southern District of New York? This question arises on the appeal.

3. Was the action of the Court in refusing to enter a decree in accordance with the stipulations of the parties, or in the alternative, refusing to set the cause for early hearing, a refusal to exercise a jurisdiction which the parties might lawfully call upon it to exercise, or at least a plain abuse of discretion?

PART I.

THE ORDER DIRECTING THAT THE DENVER COMPANY AND THE MISSOURI PACIFIC COMPANY BE MADE PARTIES IS VOID, AND A WRIT OF PROHIBITION SHOULD ISSUE AS PRAYED.

(1) If the Order of the Court be void, Prohibition is the proper remedy.

There can be no doubt that prohibition is the proper remedy in this case, for, as said by the Supreme Court of the United States in *In Re Rice*, 155 U. S., 396:

“Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a

matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want or jurisdiction does not appear upon the face of the proceedings. *Smith v. Whitney*, 116 U. S., 173; *In Re Cooper*, 143 U. S., 472, 495."

In *In re Dennett*, 215 Fed., 673, this Court has held that a lack of remedy by appeal which will justify the writ of mandamus means the lack of a remedy equal to that which may be afforded by a writ of mandamus. It is clear that an analogous rule should apply at least with equal force in the case of a writ of prohibition.

(2) The Jurisdiction of the Court over the Controversy arising on
Contract B was never invoked.

In the case of *The Equitable Trust Company of New York v. the Western Pacific*, the bill of complaint invoked the jurisdiction of the Court for the purpose of obtaining the foreclosure of the First Mortgage on the property of the Western Pacific. The appointment of the Receiver was sought and made pending foreclosure, for the purpose of preserving the property covered by the mortgage during foreclosure.

The parties to the original bill were The Equitable Trust Company and the Western Pacific—no one else. The jurisdiction of the Court was not invoked for any purpose except foreclosure, and any judgment ren-

dered against the Denver Company upon a collateral undertaking to the plaintiff would have been void upon its face.

- (3) The Court cannot require that there be submitted to it a controversy concerning which its jurisdiction has not been invoked.

In *Munday v. Vail*, 34 N. J. L., 442, the principles of law governing jurisdiction were stated as follows:

“Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this, there are three essentials: First. The Court must have cognizance of the class of cases to which the one to be adjudged belongs. Second. The proper parties must be present. And, Third. The point decided must be, in substance and effect, within the issue. That a Court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that, because A and B are parties to a suit, that a Court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves, for all purposes, under the control of the Court, and it is only over these particular interests which they choose to draw in question, that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the Court of Chancery should decree a

divorce between them, it would require no argument to convince every one that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstances that the point decided was not within the substance of the pending litigation."

In *Reynolds v. Stockton*, 43 N. J. Eq., 211, the facts were as follows: Certain persons engaged in litigation concerning the ownership of a fund of money. The Court decided not only the question presented by the pleadings, but rendered a personal judgment in favor of one party against another party. The personal judgment was declared void on collateral attack, the Court saying:

"The question presented by the appeal to this Court is, whether to the decree of the New York Court the conclusive force and effect of a judgment must be accorded.

That question is distinctly presented in *Munday v. Vail*, 34 N. J. L., 418, where it is held by the Supreme Court of this State that a decree which is entirely aside of the issue raised in the record is invalid, and will be treated as a nullity, even in a collateral proceeding.

A decree or judgment which is not appropriate to any part of the matter in controversy before the Court can have no force. The matter in controversy is that exclusively which is presented by the pleadings and the issue framed thereby.

The object of the New York suit was fully accomplished, so far as the pleadings disclosed its purpose, when the New York fund was disposed of. There was an entire absence of such specific allegations in the complaint as were necessary to

put the receiver of the New Jersey company on his defense in respect to the state of the account between that company and the Hope company.

The decree in New York, having adjudicated a matter not presented by the pleadings nor within the issue, can have no higher effect than a judgment rendered in our own courts under like conditions. Under the authority of *Munday v. Vail*, *supra*, it must be treated as a nullity."

The case went to the Supreme Court of the United States. The judgment was affirmed, and the portion of the opinion of *Munday v. Vail* quoted with approval, the Court saying:

"We regard the views suggested in the quotation from the opinion as correct, and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*. See, also, *Unfried v. Heberer*, 63 Indiana, 67."

Reynolds v. Stockton, 140 U. S., 254.

The suit before the District Court of the United States did not invoke the jurisdiction of that Court against either the Denver Company or the Missouri Pacific, nor did it submit to the jurisdiction of the Court any question other than the right to the foreclosure of the mortgage executed by the Western Pacific Company.

The order of the Court directing that the Denver Company be made a party to the action, requires that

there be submitted to the jurisdiction of the Court a controversy concerning which its jurisdiction has not been invoked.

- (4) The Court cannot on its own motion require that parties be brought in. If indispensable parties be wanting, the Court can dismiss the bill, but with this limitation the question of parties is a matter for the parties themselves.

If the parties directed to be brought in be indispensable to the decision of the controversy as to which the jurisdiction of the Court has been invoked, the Court can, of course, dismiss the bill unless they be made parties.

Minnesota v. Northern Securities, 184 U. S.,
199.

This is true only if as a consequence of their absence no binding decree can be rendered dealing with the subject-matter concerning which jurisdiction is invoked.

Shields v. Barrow, 17 How., 130-139.

It cannot, of course, be claimed that any person other than the mortgagee and the owner of the property mortgaged are indispensable to an action of foreclosure. Holders of subsidiary liens and mortgages are proper parties, but not indispensable, and the plaintiff has the absolute right to elect whether or not they shall be made parties to the foreclosure.

In *Searles v. Jacksonville Railroad*, 2 Woods, 621, Fed. Cas. No. 12,586, an action was commenced to foreclose a Railroad mortgage. An attempt was made to compel the plaintiff to make the holders of certain second mortgages parties. The Court said:

"Mr. Jackson moved that the Florida Central Railroad Company be made a party to the suit. This motion, being objected to by the counsel for the complainant, was denied; the circuit justice holding that a complainant cannot be compelled to add parties to his bill, if he choose to take the responsibility of their not being parties."

Drake v. Goodridge, 6 Blatch., 151; Fed. Cas. No. 4,062.

See also:

In re Printup, 6 So., 418, 419.

Lester v. Field, 24 Ill. App., 124.

In *Doke v. Williams*, 34 So., 569, the Court said:

"In the case of *Carter v. Smith*, 35 Fla., 169, 17 South, 411, this Court held that 'there is no practice in equity which will authorize the Court, upon the application of a person not a party to a suit, to compel a plaintiff to make such person a co-plaintiff'; resting its decision upon *Drake v. Goodridge*, 6 Blatchf., 151, Fed. Cas. No. 4,062.

The latter case announced the doctrine quoted, and held further that it was equally without precedent to make one a party defendant to a suit *in personam* upon his own application, following therein the prior ruling of the same Court in the case of *Coleman v. Martin*, 6 Blatchf., 119, Fed. Cas. No.

2,985. The same conclusion is reached in well considered opinions by Chancellor Cooper in *Stretch v. Stretch*, 2 Tenn., Ch. 140, and by McClellan, J., in *Ex parte Priputup*, 87 Ala., 148, 6 South., 418.
* * *

"As was said by Chancellor Cooper in *Stretch v. Stretch*, *supra*, 'To make a new defendant to a bill, claiming in a right not noticed by the bill, would throw the rules of chancery pleading into utter confusion, for it would be to try rights without any issue between the parties.' "

In *Shields v. Barrow*, 17 How., 145, the Court made an order directing defendants in an equity suit to file a cross-bill, bringing in new parties. The Supreme Court said:

"And it is only necessary to consider the nature of a cross-bill, to see that it cannot be made an instrument for any such end. 'A cross-bill, *ex vi terminorum*, implies a bill brought by a defendant against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill.' *Story's Eq. Pl.*, §389; 3 Dan. Ch. Pr., 1742."
* * *

"New parties cannot be introduced into a cause by a cross-bill. If the plaintiff desires to make new parties, he amends his bill, and makes them. If the interest of the defendant requires their presence, he takes the objection of non-rejoinder, and the complainant is forced to amend, or his bill is dismissed. If, at the hearing, the Court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject."

Even when by statute there is conferred upon the Court power to direct that parties be brought in when the parties are proper to the disposition of the issues presented by the pleading, jurisdiction over causes of action not asserted cannot be thus acquired.

In *Clay County Land Co. v. Alcox*, 92 N. W., 464, the Court's decision was as follows:

"Section 5178, Gen. St. 1894, as amended by Laws 1895, c. 29, relating to bringing in of additional parties plaintiff or defendant, construed, and held that the Court is only authorized to make its order bringing in such parties when it is necessary to do so in order to secure a full determination of the controversy between the original parties tendered by the complaint, answer, or counter-claim."

In *In re Printup*, 6 So., 418, the authorities on the subject were reviewed, the Court saying:

"In *Shields v. Barrow*, 17 How., 145, it is said: 'If the plaintiff desires to make new parties, he amends his bill and makes them. If the interest of the defendant requires their presence, he takes the objection of non-joinder, and the plaintiff is forced to amend or his bill is dismissed. If at the hearing the Court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject' of the introduction of new parties into a pending case. In *Drake v. Goodridge*, 5 Blatchf., 151, it is said that no such practice is known in equity as making a person a defendant to a suit on his own application, or as compelling a plaintiff to join as co-plaintiff a person not a party, on the application of such person. To the same effect is the case of *Coleman v. Martin*, Id., 119. And these cases are referred to in

the case of *Stretch v. Stretch*, 2 Tenn., Ch. 140, and the principle announced in them fully indorsed. In the latter case, as in the case at bar, the subject matter of the litigation was in the hands of a receiver, who had been appointed in the suit to which the petitioners sought to be made parties. Chancellor Cooper, in delivering the opinion in that case, uses this language: 'Where there is no privity, a stranger interested in the subject matter or objects of the suit must bring forward his claim by an original bill in the nature of a supplemental bill, or in the nature of a cross-bill, as the case may be, so that those interested adversely may have process with a copy of the bill served on them, and may have an opportunity to avail themselves of the regular modes of defense to such bill;' and, even where a third person claims under or in privity with one of the parties litigant, his interest can only be brought before the Court by bill. It cannot be done by petition. *Foster v. Deacon*, 6 Madd., 59; *Carow v. Mowatt*, 1 Edw., Ch. 9. The case of *Searles v. Railroad Co.*, 2 Woods, 621, involved a relationship between the petitioning and litigant parties made like that existing in the facts of this case. That was a bill filed by the owners of the first mortgage bonds of a railroad to foreclose the mortgage and sell the road in payment of the bonds. The petitioner claimed to be the owner of second mortgage bonds of the defendant company, and as such desired to set up certain equities he had against the right of complainant to foreclose and apply the proceeds of foreclosure to the payment of the first mortgage bonds. The motion to be made a party was denied by Mr. Justice Bradley, and it was held that 'a complainant cannot be compelled to add parties to his bill if he choose to take the responsibility of their not being parties.'

Applying these settled rules to the case at bar, it is quite evident that the order directing that the Denver and Missouri Pacific be brought in is not only erroneous, but void.

The Denver & Rio Grande Railroad Company was not an indispensable party; it was not even a proper party.

The only excuse found for bringing in the Denver is that the suretyship provisions of Contract "B" may be enforced against it. It cannot, of course, be claimed that a surety is a necessary party to an action to foreclose upon the security given for the debt. Indeed, it has been held that the surety is neither a necessary nor a proper party to such a proceeding. This precise question was presented to the Court of Appeals in the case of *Columbia Finance & Trust Co. v. Kentucky Union Railroad*, 60 Fed., 794. The facts are stated in the opinion of the Court of Appeals rendered by Judge Lurton:

"The first error assigned is in rejecting the amended answer tendered by the Columbia Finance & Trust Company on the 20th day of December, 1892, and in proceeding with the cause without requiring the Kentucky Union Land Company to be made a party thereto. It appears from this answer that the Kentucky Union Land Company guarantied the payment of the principal and interest of the first mortgage bonds, which guaranty was indorsed thereon; that this guaranty was made under authority of the charter of the Kentucky Union Railway Company. It further appears that when the coupons of this issue of bonds

became due on January 1, 1891, the land company and the railway company jointly borrowed on their notes \$60,000 from J. Kennedy Todd & Co., and with the money paid that series of coupons. The insistence of the appellant is that the Kentucky Union Land Company became by said payments entitled to a lien upon the railroad to secure the payment of this sum of \$60,000, which was used for the payment of coupons, and that it was error to proceed without bringing that company before the Court, that its lien might be established and enforced.

The unquestioned general rule as to parties in chancery is that all parties who are interested in the controversy should be made parties to the cause in order that there may be an end of litigation. If the Kentucky Union Land Company, by the payment alleged to have been made by it, as guarantor, became thereby entitled to a lien upon the property of the railway company, through subrogation, then it would have been a proper party, as it would have been interested in the property proceeded against. It would, however, in no sense be an indispensable party, because it would not have been directly affected by a decree enforcing the liens held by the holders of the first and second mortgage bonds. The distinction between a person directly interested in a controversy and directly affected by the decree, and one only indirectly affected by the decree, is well stated by Mr. Justice Bradley in the case of *Williams v. Bankhead*, 19 Wall., 571. We do not think that the Kentucky Union Land Company was an indispensable, or even a proper, party."

It cannot be contended that by virtue of the traffic features of Contract "B," the Denver Company became either a necessary or a proper party. The traffic

rights acquired by the Western Pacific under Contract "B" were part of the security pledged. The bondholders of the Western Pacific had, by virtue of the very terms of Contract "B," the right to have the road sold with those traffic provisions in force, or by concurrent action of two-thirds in principal amount, to terminate these features. This was part of their contract and part of their security. To make the Denver a party for the purpose of cutting off any traffic rights which it might take under Contract "B," would necessarily result in the destruction of the dependent traffic rights of the Western Pacific Company, for the traffic features of the contract were mutually dependent. But, by the express provisions of Contract "B," the question of whether the road should or should not be sold with the traffic contract in force, rested with the holders of two-thirds in principal amount of the bonds, the power in trust to terminate the contract being vested in the Trustee. The traffic rights were the property of the Western Pacific Company, but subject to termination by the Trustee. The Denver Company had no right to terminate them in any event. The Denver Company was, therefore, not only not a necessary party, but not even a proper party in this aspect of the case. Certainly, it was in no sense an indispensable party, and under any circumstances the plaintiff had the right to proceed without it if it so desired.

The past advances made by the Denver Company

to the Western Pacific Company pursuant to the provisions of Contract "A" and Contract "B" were not either a legal or equitable charge upon the property of the Western Pacific Company. These advances were by the very provisions of the contracts no more than floating debt evidenced, or to be evidenced, by unsecured notes. So, in no aspect of the case was the Denver Company either a necessary or a proper party. But as it cannot even be claimed that that Company was an indispensable party, and as no party to the suit made any objection to proceeding without the presence of the Denver, the order of the Court directing that the Denver be made a party was absolutely void.

As said in *Greenleaf v. Queen*, 1 Peters, 138, 147:

"It was insisted by the counsel for the appellees, in anticipation of the above objection, that the Court below would have been warranted in dismissing the bill absolutely, without requiring anything to be performed by the new trustee, in consequence of the omission of the plaintiff in that suit to make proper parties.

"That a bill may be dismissed where the plaintiff, when called upon to make proper parties, refuses or is guilty of unreasonable delay in doing so, need not be questioned; but to do so without a demurrer, plea, or answer, pointing out the person or persons who the defendants insist ought to be made parties, is unprecedented."

In the absence of actual fraud the right to control the proceeding under the mortgage is vested in a majority of the bondholders, and they cannot be deprived of this right which forms part of their security.

The claim is asserted that the ordinary rules of law applicable to a case of this class do not apply, for the reason that the plaintiff is a trustee of the bond issue, and it is claimed that when the trustee of a bond issue sues to foreclose, all discretionary powers of the trustee are transferred from the trustee to the Court. This contention is an attempt to apply to foreclosure proceedings principles which apply only to suits of a very different class.

It is true that in an administration suit by a trustee against his beneficiaries, a trustee seeking the instruction of a court as to how it shall exercise its powers, cannot after *decree* exercise discretionary powers which are by the decree assumed by the court. This rule has no application to suits commenced by a trustee in execution, as distinguished from administration of the trust, and even in administration suits the rule does not apply before decree, for the trustee has full control of the action and may dismiss it.

Sellebourne v. Newport, 1 K. & J., 601.

The rule does not apply to a suit to collect a debt.

Neeves v. Burrage, 14 Q. B. R., 504.

In a suit by a trustee to foreclose a mortgage securing an issue of bonds, the conduct of the trustee is,

in the absence of any provision of the deed of trust or mortgage, controlled by a majority of the bondholders, and if, as in the case at bar, this right be expressly given by the mortgage or by the deed of trust, it constitutes a very part of the security itself, and cannot, in the absence of fraud, be wrested from the majority.

In *Shaw v. Railroad Co.*, 100 U. S., 605, the Court said:

"The trustees had an undoubted right to commence these suits when they did, and it is apparent from the whole record that all their proceedings, both before and after the sale, were in the interest of their beneficiaries generally, since one hundred and eighty in number, representing in the aggregate eight million out of the eight million five hundred thousand dollars of bonds outstanding, accepted the result and exchanged their bonds for stock in the new corporation. *To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense even of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders, secured by a railroad mortgage, bear to each other.* Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what

they ask is not inconsistent with the provisions of his trust.

In *State v. Brown*, 21 Atl., 374, the Supreme Court of Maryland said:

“As to the appeal of Mr. Carter, trustee and executor, it is sufficient to say, if there is any difference of opinion among the bondholders whether their interests will be best subserved by these proceedings, the will of the majority must in this, as in other like cases, govern. The suit was brought by the trustees at the request of a majority of the bondholders, and so long as they act in good faith, and for the purpose of carrying out the trust reposed in them under the mortgage, a minority bondholder has no right to interfere with them in the discharge of their duty. *Shaw v. Railroad Co.*, 100 U. S., 605. A good deal was said about the veil which conceals the real motives that have prompted this litigation. Whatever they may be, we must deal with the case as it is presented by the record, and, so dealing with it, we are of opinion that the decree below must be affirmed.”

In *Waldoborough v. Knox*, 24 Atl., 942, the Supreme Court of Maine said:

“Such bonds are often held by a great many persons, and, when they differ as to the best mode of rendering their security available, we think it is the right of the majority in interest to determine. The Court so held in *Shaw v. Railroad Co.*, 100 U. S., 605. The Court there said that to allow a small minority to defeat the wishes of an overwhelming majority of those associated with them in the benefits of the common security would be to ignore entirely the relations which bondholders,

secured by a railroad mortgage, bear to each other; and that, if differences of opinion exist among them, the voice of the majority ought to govern."

Such is the law in the absence of a specific provision in the mortgage. If, however, the mortgage contain a provision on the subject, it is controlling.

In *Gates v. Boston & N. Y. Air-Line R. Co.*, 5 Atl., 695-701, the Supreme Court said:

"So, too, in relation to the other boldholders, it is manifest that each bondholder enters into contract relation with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose, is modified by the same existent right in every other holder. His absolute right of control is limited, not only by the express provisions of the bond and mortgage, but also, in great measure, by the peculiar nature and character of the security. *Canada Southern R. Co. v. Gebhard*, 109 U. S., 534, 537; S. C., 3 Sup. Ct. Rep., 363. 'To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense, even, of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders secured by a railroad mortgage bear to each other. Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and, in executing his trust, may exercise his discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority acting in good faith and without collusion,

if what they ask is not inconsistent with the provisions of his trust.' *Shaw v. Railroad Co.*, 100 U. S., 611, 612."

"anything in this indenture contained to the contrary notwithstanding, the holders of a majority in amount of the bonds hereby secured and outstanding shall have the right from time to time, if they so elect and manifest such election by an instrument in writing executed and delivered to the Trustee, to direct and control the method of conducting any and all proceedings for any sale of the premises and property hereby conveyed, mortgaged and pledged, or for the foreclosure of this indenture or for the appointment of a receiver or for any other action or proceeding hereunder, and for such purpose to instruct the Trustee to exercise its rights of election to declare said bonds due or to waive the exercise of the same, or if exercised, to annul the same, or to institute, continue or discontinue any proceedings hereunder."

The Fact That the Assets of the Western Pacific Railway Were in the Hands of a Receiver Affords No Basis for the Order.

Our opponents seek to justify the order on the ground that the property of the Western Pacific Railway was in the hands of a receiver.

This fact, however, is quite immaterial. The appointment of a receiver in an action to foreclose a mortgage does not enlarge the issues or the jurisdiction of the Court as between the parties to the action.

As stated at the outset, Contract B contained three sets of covenants:

1. The covenant to pay to the trustee the difference

between the amount of interest due and the amount of interest paid by the Western Pacific Railway.

This covenant vested no property right in the Western Pacific. It was not pledged, for it did not belong to or run in favor of the Western Pacific, and only the rights of the Western Pacific were pledged. Moreover, by the terms of the mortgage it was expressly excluded from its operation.

Sec. 3, Art. V, Mortgage.

By the express terms of the contract it survived foreclosure sale and could not be sold.

The receiver did not take possession of any right under the covenant and the order appointing him could not have vested in him any right thereto.

Staples v. May, 87 Cal., 178.

2. The covenants in relation to traffic rights.

These covenants are assets of the Western Pacific Railway Company and must be sold with the property unless the bondholders elect to terminate them; the right to terminate these and all other provisions of the contract, except the covenant to pay to the trustee, being vested in two-thirds of the bondholders by the contract itself. *Yet the exercise of this right is now forbidden by injunction.*

3. The covenant to loan to the Western Pacific Railway a sum which when added to its other revenues

would be sufficient to pay taxes, maintenance, interest on first mortgage and sinking fund.

This covenant was an asset of the Western Pacific, but it did not give to that corporation any right to the possession of moneys essential to the payment of interest or sinking fund, for these payments were to be made to the trustee.

This covenant did not survive foreclosure and in all human probability could not be enforced by receivers who were not applying the earnings of the road to the payment of interest.

Its existence is, however, the sole ground for enjoining the trustee for the bondholders from prosecuting this action on the covenant running to the trustee alone.

It is asserted that the existence of this covenant forms a ground for directing that new parties be brought into this litigation and the entry of a decree delayed.

Assuming that this covenant survived and could be enforced by the receivers, it could not be enforced in this action but only in a suit by the receivers on the covenant. But the existence of such a right of action by the receivers was not a matter to be asserted in the suit to foreclose; *nor would the existence of a pending action to enforce this contract be a ground for refusing a decree in this suit.* Both *principal and interest of the bonds are due and the existence in the hands of the debtor of a contractual right to borrow money sufficient to pay interest, obviously cannot suspend the right*

of the creditor to have the pledged assets appropriated to the payment of principal and interest.

In addition to this, the very existence of this covenant was subject to the will of the holders of two-thirds in amount of bonds. The right to terminate the covenant being vested in the bondholders themselves, it follows as a necessary incident that no rights under this covenant could be asserted after default against the will of the holders of two-thirds in principal amount of bonds.

We submit that the Writ of Prohibition should issue as prayed.

PART II.

THE COURT ERRED IN ENJOINING THE PROSECUTION OF THE DEPENDENT BILL IN NEW YORK.

The Maintenance of the Action in New York is not an Interference with the rights of the Receivers and does not constitute a Contempt.

(a) The provisions of Contract "B," by which the Denver Company made itself surety to the Trustee for the obligations of the Pacific Company as to interest and sinking fund payments, are not in any sense assets of the Pacific Company.

Jones on Corp. Bonds and Mortgages, §274a (3rd Ed.).

In *Winthrop Nat. Bank v. Minneapolis, etc. Co.*, 77 Minn., 329, 79 N. W., 1010, the Court said:

"It is impossible to conceive how the right of the bondholders to pursue the living guarantor, or the representatives of the estate of the one who is dead, upon their contract of guaranty, or the other right as against the property mortgaged by these guarantors, can be regarded as assets, legal or equitable, of the defendant corporation, which must be resorted to or exhausted before judgment as demanded and ordered can be entered in this action. Langdon and Hinkle became personal sureties in behalf of the corporation, and also sureties, as mortgagors of their property; and the liability which they incurred as such sureties is not an asset of their principal."

(b) The right asserted by the Trustee in the dependent bill is not a right to property, to the possession of which the Receivers are entitled, for Contract "B" expressly provides that the Pacific Company shall have no right to the money to the payment of which the Trustee is entitled.

"Neither the Pacific Company nor anyone claiming under it, save only such persons or corporations as may be entitled to receive the interest upon said First Mortgage Bonds, shall be entitled to or possess any interest in, lien upon or claims to said fund, or any part thereof."

Sec. 4 (d), Art. II (p. 12), Contract "B."

The right asserted against the Denver Company by the trustee is neither a property right of the corporation whose assets are in the hands of the Receivers nor is it a right to property, to the possession of which the Receivers are entitled.

(c) The fact that the right asserted is found in a written instrument to which the Pacific Company and the Denver Company and the Trustee are all parties, does not affect the question, as the provisions sued on are separate, severable, independent provisions operating between the Denver Company and the Trustee alone. The contract itself expressly declares this to be the case.

Sec. 4 (a), (e), Art. II, Contract "B";

Sec. 10, Art. VI, Contract "B."

Indeed, the provisions sued on survive and endure after the property of the Pacific Company has been sold and every other provision of Contract "B" abrogated.

Sec. 14, Art. VI, Contract "B";

Sec. 3, Art. V, Contract "A";

Sec. 9, Art. IV, Contract "A."

(d) If the Trustee had loaned at interest part of the sinking fund which had already been paid to it, undoubtedly it could sue to recover the same, without leave of the Court; and its right to sue to recover interest and sinking fund payments not paid, without such leave, is equally clear. In so doing, it does not seek to recover property, to the possession of which the Receivers are entitled.

The obligation runs directly to the Trustee, and even if its rights are those only of a pledgee, the

powers of a pledgee in possession are not suspended by a receivership; indeed, property in pledge can be sold without leave of Court.

Fidelity Ins. Co. v. Roanoke Iron Co., 81 Fed.,
439, 445;

Guaranty Trust Co. v. Galveston City R. R.,
877 Id., 813.

Indeed it is well settled that the holder of a power of sale over mortgaged property can exercise that power after the initiation by him of foreclosure proceedings and during the pendency thereof.

Mayall v. Eppinger, 127 Cal., 5;
Brisbane v. Stoughton, 17 Ohio, 482.

So even if the object of making the direct covenant with the Trustee was merely that of vesting the legal right to the chose in action in the Trustee, that has been done; and that legal right can be exercised by the Trustee even if the Trustee be regarded as a mere pledgee.

(e) The right of the Trustee to recover on the contract of suretyship is not the same as that of the Pacific Company on the agreement to loan. The obligation to buy notes of the Pacific Company is measured by the difference between gross earnings and the amount required. The obligation to pay to the Trustee is measured by the difference between the amount actually appropriated and paid and the amount due.

Sec. 7, Art. VI, Contract "B";

Sec. 4 (a), Art. II, Contract "B."

(f) The Receivers of the Pacific Company are not entitled to the possession of the moneys provided to be paid by the Denver Company to the Trustee, even if the right to have these moneys paid be one which they can enforce. This specific property is not receivable by the Company and a suit to recover the same does not constitute an interference with the rights of the Receivers for this reason, if for no other, and, therefore, cannot be enjoined.

Re West Lancashire R. R., 63 Law Times, 56.

The fact that the Pacific Company is Named as a Party defendant in the Action in New York merely for the Purpose of an accounting is not a ground for the Issuance of an Injunction forbidding the prosecution of a suit by the Equitable Trust Company against the Denver Company to recover interest and sinking fund payments on Contract "B."

(a) The fact that the property of the Pacific Company is in the hands of Receivers appointed pending foreclosure does not prevent that corporation being made a party to an action in which no judgment for property in the hands of the Receivers is sought.

Decker v. Gardner, 124 N. Y., 334.

(b) Where a cause of action arises on contract prior to the appointment of receivers, it seems the receivers

are neither necessary nor proper parties, unless the contract be affirmed.

Northern Pacific R. Co. v. Heflin, 83 Fed., 93.

(c) Corporate existence is neither destroyed nor suspended by the appointment of a receiver in an action to foreclose a mortgage; and if no execution against property in the hands of the receiver is sought, the corporation may be made a party for purposes of an accounting in an action in which a third person's liability depends on the condition of the accounts between the corporation and that person.

Re West Lancashire R. R., 63 Law Times, 56.

(d) Even if the Pacific Company cannot be sued without leave of Court, the action may be continued against the Denver Company; and the question of whether or not the action shall be so continued is a question for the New York Court.

Patterson v. Stewart, 41 Minn., 84, 16 Am. St. Rep., 671.

The commencement of the action to foreclose the Pacific Company mortgage did not deprive the Equitable Trust Company or the bondholders of the right to control proceedings against the Denver Company on the contract of suretyship.

(a) The Denver Company is not a party to the action pending in the District Court, and the rights of the Trustee and bondholders against the Denver

Company have not been submitted to that Court for adjudication.

(b) Any judgment which that Court might render against the Denver Company and in favor of the Equitable Trust Company would be void on its face.

(c) Contract "B" gives complete control over proceedings against the Denver Company upon its obligations as surety to the bondholders.

(d) If the bondholders see fit to direct the Trustee to obtain judgment against the Denver Company before or after obtaining judgment of foreclosure against the Pacific Company, they have the right to do so. This right is expressly accorded them by Contract "B."

(e) Equity rule No. 42 accords to plaintiff the absolute right to proceed against the Pacific Company and the Denver Company separately. This rule is binding on this Court, and the Equitable Trust Company cannot be deprived of the rights accorded by it.

"In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."

Rule 42 of Rules of Practice for the Courts of
Equity of the U. S.

(f) Where separate causes of action exist, the initiation of a proceeding on one of the causes of action does not confer jurisdiction over the other. If the second cause of action be initiated in a court of concurrent jurisdiction, the court in which the first cause of action has been initiated may continue the case pending before it if it believes the cause of action pending before it should only be determined after the second cause of action has been passed upon. It cannot, however, deprive the court which first obtained jurisdiction of that cause of the right of proceeding; nor can it enjoin the plaintiff from proceeding in a court of concurrent jurisdiction for relief not sought in the first action.

In *Buck v. Colbath*, 3 Wall., 334, the Court said:

“Seizing upon some remarks in the opinion of the Court in the case of *Freeman v. Howe*, not necessary to the decision of that case, to the effect that the Court first obtaining jurisdiction of a cause has a right to decide every issue arising in the progress of the cause, and that the Federal Court could not permit the State Court to withdraw from the former the decision of such issues, the counsel for plaintiff in error insists that the present case comes within the principle of those remarks.

“ * * * But it is not true that a Court, having obtained jurisdiction of a subject matter of a suit, and of parties before it, thereby excludes all other Courts from the right to adjudicate upon other matters having a very close connection with those before the first Court, and, in some instances, re-

quiring the decision of the same questions exactly.

"In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither Court is affected by the proceeding in the other. And this is true, notwithstanding the common object of all the suits may be the collection of the debt. The true effect of the rule in these cases is, that the court of chancery cannot render a judgment for the debt, nor judgment of ejectment, but can only proceed in its own mode, to foreclose the equity of redemption by sale or otherwise. The first court of law cannot foreclose or give a judgment of ejectment, but can render a judgment for the payment of the debt; and the third court can give the relief by ejectment, but neither of the others. And the judgment by each court in the matter properly before it is binding and conclusive on all the other courts. This is the illustration of the rule where the parties are the same in all three of the courts."

The lower Court acquired jurisdiction only of the controversy presented by the pleadings as they stand.

Watson v. Jones, 13 Wall., 679, 716-17.

See also:

Nelson v. Camp, 191 Fed., 712;

Mercantile Trust Co. v. Lemoille, etc. R. R. Co., 16 Blatchf., 324.

The District Court has no power to interfere with the proceeding pending in New York.

The pending suit in the District Court of the United States for the Southern District of New York was instituted by the filing by The Equitable Trust Company of New York of its bill against The Denver & Rio Grande Railroad Company, which is a corporation formed by the consolidation of the Denver Company and the Western Company, parties of the first part to Contract B. The bill prays that the amount due under Contract B. from the defendant to the plaintiff, as Trustee for the holders of bonds secured by the First Mortgage of the Western Pacific Company, be determined, that it be adjudged to be a charge upon the property of the defendant, and that the charge be enforced by foreclosure.

The form of the bill in that suit was evidently governed to some extent, if not chiefly, by the urgent necessity that individual holders of bonds secured by the Western Pacific Company's First Mortgage who had instituted or were threatening to institute actions in their own behalf for the recovery from the Denver & Rio Grande Company of their proportionate shares of the amount of its liability under Contract B., should

be restrained from prosecuting such actions, to the end that the liability of the Denver & Rio Grande Company should be enforced for the equal and proportionate benefit of all the bondholders according to the terms of the contract.

The suit was instituted by the plaintiff as Trustee for the bondholders, and in its own name and right and for its own benefit as such. It could not have been successfully instituted in the name of or for the benefit of the Western Pacific Company, because the money sought to be recovered was provided in the contract, which is the subject matter of the suit, to be paid to the Trustee; and the right to receive it was expressly given to the Trustee by the obligor in the contract. It is contended, however, that because Contract B. provides generally that actions for the enforcement of the covenants in the contract may be brought by the Pacific Company as well as the Trustee, that provision applies to the covenant upon which this suit was brought; and the Pacific Company had, and the receivers in its stead have, a right of action upon it.

If it were true that the receivers have a right of action against the Denver Company upon this liability, the only form of action open to them would be, of course, an action in equity for specific performance of the contract to pay money to the Trustee; because it is the Trustee alone which is entitled to receive it. But it is clear that the Pacific Company could not

prevail in an action for specific performance, because it is itself in default in the performance of its covenants contained in the contract. We do not leave out of consideration the provision in the contract that the refusal or failure for other reasons of the Pacific Company to perform its covenants shall not constitute ground for refusal of the Denver Company and the Western Company to perform theirs. But we submit that that provision would not compel a court of equity to decree specific performance of the covenants of the Denver Company and the Western Company at the suit of the Pacific Company. Specific performance is not a matter of right. Granting it is in the sound discretion of a court of equity. It is fundamental and jurisdictional that it will not be awarded unless the plaintiff is ready and willing to perform; and it will not even then be awarded if it will result in severe hardship.

It must be clear that the provision that the Denver Company and the Western Company must perform their covenants in any event was placed in the contract for the protection of the Trustee only, and not for the benefit of the Pacific Company. If it were not there, the contract would be worthless to the bondholders. The members of the railway family could agree to violate it reciprocally as they pleased.

We think, then, that the realizing against the Denver Company is in jeopardy if the Trustee be enjoined in this court from prosecuting its action. We think

that it is not only the proper party to sue, but, as well, the only party which can sue on the claim. If this court shall prevent its doing so, it will deprive it of a substantial and valuable property right without due process of law; and its action will be void.

With regard to the contention that the suit should have been brought in this court instead of in the New York court, we protest again that there has been no disposition to evade this court. No idea of proceeding in this court was ever entertained, before the suit was brought. The Denver Company has no property in this district and it is at least doubtful whether jurisdiction over its person could be had here without its consent. Be that as it may, this court would certainly not have power to enforce by foreclosure a charge against its property. Upon no consideration, therefore, would suit in this court have been advisable.

Prior to the institution in the New York court of the suit of The Equitable Trust Company against the Denver and Rio Grande Railroad Company, the receivers appointed in this suit in California, had presented to this court their petition asking that they be allowed six months from the date of the petition within which to present to this court all matters connected with certain specified contracts, including Contract B., between the Western Pacific Company and the Denver & Rio Grande Company; and that, in the meantime, they "be authorized and directed to continue the operation of said railroad" (the

Western Pacific) "under said contracts without prejudice, however, to any rights arising or accruing therefrom." It may be observed in passing that this petition made no reference to the rights of The Equitable Trust Company against the Denver and Rio Grande Company arising out of the agreement of suretyship in Contract B.

The committee of holders of bonds of the Western Pacific Company, representing nearly forty-one millions of dollars face value of such bonds, had requested The Equitable Trust Company, as trustee for the bondholders, to enforce the liability of the Denver and Rio Grande Company under its agreement of suretyship contained in Contract B.; and the suit in New York was instituted in compliance with that request and in performance of the duty to that end imposed upon the trustee by the terms of that contract.

Counsel for The Equitable Trust Company residing in California knew of the filing of this petition, but did not know that the suit in New York was impending. Counsel for The Equitable Trust Company residing in New York did not know, when the bill in the New York suit was filed, that this petition had been presented to this court or that any such petition was contemplated; nor did any member of the committee of bondholders who requested that the suit be begun, so far as we have been advised. It seems impossible, then, to predicate, upon the fact that the New York suit was instituted after this pe-

tition was filed, or upon any other aspect of the matter, any suspicion that the action of any of those who were responsible for the institution of the suit in New York was instigated, or precipitated as to time, by the desire to evade the jurisdiction of this court or to trespass to any extent upon its prerogatives; but, nevertheless, we wish again to protest that no such desire was ever entertained in the matter, much less acted upon.

PART III.

THE ACTION OF THE COURT IN REFUSING TO ENTER A DECREE IN ACCORDANCE WITH THE STIPULATIONS OF THE PARTIES, OR, IN THE ALTERNATIVE, REFUSING TO SET THE CAUSE FOR HEARING, WAS A PLAIN ABUSE OF DISCRETION.

It is well settled that this Court has jurisdiction to issue a Writ of Mandamus, directing the lower Court to hear and determine a cause pending before it, when that Court refuses so to do on account of reasons insufficient in law.

Barber Asphalt Co. v. Morris, 132 Fed., 945;
McClelland v. Garland, 217 U. S., 268.

On mandamus the Court is not confined to questions of jurisdiction, as is the case on prohibition. If, therefore, the refusal of the Court to decide the cause after all parties had consented to a decision was plainly erroneous, that error can be corrected on mandate.

Horsburgh v. Murasky, 169 Cal., 500.

There can be no doubt that the action of the Court in refusing a decree was erroneous. Even if the Court were correct in ordering that the Denver Company be made a party (which it was not), that was no ground for refusing to proceed and foreclose. The guaranty of the Denver ran only to interest and sinking fund, and as the principal of the bonded debt was due, it was absurd to postpone foreclosure sale in order to determine whether the interest and sinking fund guaranteed could be collected.

The sinking fund was but \$50,000 per year, and it would require approximately 1,000 years for these payments to equal the amount of principal due and payable forthwith.

The claim that one holding a debt secured by mortgage could not collect by foreclosure the principal of the debt then due, merely because it might be possible to collect interest from one who had guaranteed payment of interest, is absurd.

On hearing of the motion to set, the following dialogue took place:

THE COURT—That does not answer the question. The question is what are the rights of the bondholders of the Western Pacific under that contract; and if they are such as are seriously claimed for them, counsel can readily perceive that if the Denver & Rio Grande can be held responsible, and is able to respond, there would be nothing left here as requiring a sale of the physical properties of this road to meet those obligations.

MR. HOW—I should not off-hand, your Honor,

be of the opinion, nor should I be willing to assent to the proposition, that a right to foreclose a mortgage is gone merely because a surety upon a debt secured by the mortgage is good. I think the right to foreclose the mortgage is an independent right.

THE COURT—I am not saying that that is not true; what I am saying is that it might readily be found that it would not be necessary to sell this property. It does not follow necessarily that it would not. I am not prepared to say that it would not. But, certainly, in proceeding to determine the up-set price—in providing a decree for the sale of this property an up-set price for the disposition of this property under a sale—the Court would have to be afforded, it seems to me, the information which would come as a result of determining the character and the extent of that security afforded by the provisions of Contract B.

MR. HOW—In that position, your Honor, I will say that my associates and apparently all parties to the action disagree in your Honor's statement of the law.

This dialogue shows that the Court was either ignorant of the character of the proceeding before it, or was acting on some legal theory unknown in the jurisprudence of this country.

In view of the facts disclosed by the affidavits, the refusal of the Court to set the cause or make the decree, coupled with its declared intent to postpone a decision on the motion till after a decision by this Court, was in effect a denial of the motion.

The Claim Asserted by the Petitioners in Intervention That No Decree Should Be Entered Because the Obligations of the Denver Company Under Contract B are Secured by an Equitable Charge on the Properties of the Denver Company, Affords No Basis for Refusing a Prompt Decree.

We have already shown that the existence of the collateral obligation of the Denver Company to pay interest and sinking fund gives no excuse for refusing a prompt decree.

It is, however, asserted that this obligation is secured by an equitable charge upon the properties of the Denver Company. If that be true such charge runs in favor of the Equitable Company as Trustee, and could not be foreclosed in this suit or in the Northern District of California or any jurisdiction other than that in which at least some of the property is situated. The assertion is predicated upon the provision of the contract declaring that the covenants of the Railway Companies parties to Contract B shall run with the respective railways of the parties. The contract contains a further provision declaring that the successors of either party shall be bound by an express trust to perform the obligations of such party.

In view of the decisions of the Supreme Court of the United States in *Des Moines R. R. v. Wabash*, 135 U. S., 576, it is difficult to declare just what the ultimate effect of these covenants may be. In that case it was held that a similar covenant did not create a lien taking priority to a mortgage subsequently executed. It is therefore a matter of doubt whether if a

lien exists it takes priority to the adjustment and refunding mortgage of the Denver Company, even if it can be established that the purchasers of bonds secured by those mortgages took with actual notice. Assuming that such charge exists, its assertion and complete enforcement at the present time will result in a receivership of the Denver Company and many years of litigation must ensue before the fact and the rank of the lien is established.

Without in any way abandoning the claim that such a lien exists and is in fact prior to the bonds of the Denver Company secured by the adjustment and refunding mortgage, the majority of the bondholders of the Western Pacific Railway assert that they have the right to realize upon the security mortgaged to secure both principal and interest of the debt owing to them without waiting till the value and rank of the guaranty is established and enforced.

Clearly, the right to realize upon the property mortgaged is not and cannot be suspended because the guarantee of the interest may be secured by an equitable charge.

Of course, the existence of these provisions purporting to create covenants running with the land do not make the Denver Company either a necessary or a proper party to the foreclosure suit. This is decided in the case of *Des Moines R. R. Co. v. Wabash Ry. Co.*, 135 U. S., 576, 581, where that court denied the right of one railroad to intervene in proceedings

to foreclose a mortgage upon another road, though the roads had entered into a contract providing:

“This contract and any damages for the breach of same shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosoever hands they may come, the lien on the Adel road being limited to so much thereof as lies between Waukee and Panora.”

and the mortgage in process of foreclosure was executed after the contract.

Respectfully submitted,

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JOHN F. BOWIE,

Amici Curiae.

No. 2755

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EX PARTE THE EQUITABLE TRUST COMPANY
OF NEW YORK, AS TRUSTEE OF THE FIRST
MORTGAGE OF THE WESTERN PACIFIC RAIL-
WAY COMPANY, PLAINTIFF IN THE ACTION
OF THE EQUITABLE TRUST COMPANY OF NEW
YORK, AS TRUSTEE, AGAINST WESTERN
PACIFIC RAILWAY COMPANY.

BRIEF OF RESPONDENT IN REPLY TO PETITION FOR WRIT OF PROHIBITION.

GARRET W. McENERNEY,
JOHN S. PARTRIDGE,
Attorneys for Respondent.

Filed

Filed this.....day of March, 1916. MAR 20 1916

F. D. Monckton,
FRANK D. MONCKTON, *Clerk.* **Clerk.**

By.....Deputy Clerk.

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PACIFIC RAILWAY COMPANY.

BRIEF OF RESPONDENT IN REPLY TO PETITION FOR WRIT OF PROHIBITION.

This is a petition for a writ of prohibition, to restrain the court below from putting in effect its order bringing in the Denver & Rio Grande Railroad Co., and the Missouri Pacific Railway Co. as parties to the action.

I.

IT IS ELEMENTARY THAT PROHIBITION WILL NOT LIE WHEN
THE COURT HAS JURISDICTION.

Prohibition will only lie when the court is without jurisdiction, or has exceeded its jurisdiction.

It cannot be made to serve the office of an appeal or writ of error; and however erroneous the judgment of the court may be, still if it has jurisdiction of the subject-matter of the order or decree, the writ will not lie.

In the Matter of Rice, 155 U. S. 396, the Supreme Court says

“Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want or jurisdiction does not appear upon the face of the proceedings. *Smith v. Whitney*, 116 U. S. 167, 173 (29:601, 602); *Ex Parte Cooper*, 143 U. S. 472, 495 (36:232, 239). Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition.”

Jurisdiction is not limited to making correct decisions, either of law, or of fact. Thus, in *Board of Commissioners v. Platt*, 79 Fed. 570, the Court of Appeals for the Eighth Circuit quotes from *Foltz v. St. Louis, etc. Ry. Co.*, 60 Fed. 316, as follows:

“Jurisdiction of the subject-matter is the power to deal with the general abstract ques-

tion, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong; and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ or error or appeal, or impeached for fraud. *Insley v. U. S.* 14 Sup. Ct. 158; *Cornett v. Williams*, 20 Wall. 226; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 8 Sup. Ct. 217; *In re Sawyer*, 124 U. S. 200, 221, 8 Sup. Ct. 482; *Skillerns v. May's Ex'rs.*, 6 Cranch 267; *McCormick v. Sullivant*, 10 Wheat. 192; *Hunt v. Hunt*, 72 N. Y. 217; *Colton v. Beardsley*, 38 Barb. 30, 52; *Otis v. The Rio Grande*, 1 Woods 279, Fed. Cas. No. 10,613; *Hamilton v. Railroad Co.*, 1 Md. Ch. 107; *Evans v. Haefner*, 29 Mo. 141, 147; *State v. Weatherby*, 45 Mo. 17; *Rosenheim v. Hartsock*, 90 Mo. 357, 365, 2 S. W. 473; *State v. Southern Ry. Co.*, 100 Mo. 59, 13 S. W. 398; *Hope v. Blair*, 105 Mo. 85, 93, 16 S. W. 595; *Musick v. Railway Co.*, 114 Mo. 309, 315, 21 S. W. 491. Wherever the right and the duty of the court to exercise its jurisdiction depend upon the decision of the question it is invested with the power to hear and determine, there its judgment, right or wrong, is impregnable to collateral attack, unless impeached for fraud."

In the *Matter of Pollitz*, 206 U. S. 323, the court below had made an order refusing to remand. The

question involved in the motion to remand was whether or not certain other persons were necessary parties. It was distinctly held, that inasmuch as the court had jurisdiction to determine that question, the extraordinary remedy of *mandamus* would not lie. The court says:

“The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the circuit court, to which the decision was by law committed.

“The application to this court is for the issue of the writ of *mandamus* directing the circuit court to reverse its decision, although in its nature a judicial act, and within the scope of its jurisdiction and discretion.

“But *mandamus* cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.”

And it has been so often decided that prohibition will never lie, unless the court has *clearly* exceeded its jurisdiction, that citation may seem unnecessary. We may, however, refer to:

Ex parte Gordon, 104 U. S. 515;

Ex parte Detroit River Ferry Co., 104 U. S. 519;

Ex parte Slayton, 105 U. S. 451;

Smith v. Whitney, 116 U. S. 167;

Re Garnett, 141 U. S. 1.

In *State of California v. S. P. Co.*, 157 U. S. 229 (39 L. Ed. 690), it is said:

“It was held in *Mallow v. Hinde*, 25 U. S. 12 Wheat. 193 (6:599), that where an equity cause may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the circuit court if its process cannot reach them or if they are citizens of another state; but if the rights of those not before the court are inseparably connected with the claim of the parties litigant so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the circuit court forms no ground for dispensing with such parties. And the court remarked: ‘We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity whatever may be their structure as to jurisdiction. We put it upon the ground that no court can adjudicate directly upon a person’s right, without the party being actually or constructively before the court.’

“In *Shields v. Barrow*, 58 U. S., 17 How. 130 (15:158), the subject is fully considered by Mr. Justice Curtis speaking for the court. The case of *Russell v. Clarke*, 11 U. S. 7 Cranch, 98 (3:281), is there referred to as pointing out three classes of parties to a bill in equity; ‘1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3.

Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.' Reference is made to the Act of Congress of February 28, 1839 (5 Stat. at L. 321, chap. 36) and the 47th Rule of equity practice. The first section of the statute, carried forward, into section 738 of the Revised Statutes enacted: 'That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties; not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit.' But Mr. Justice Curtis remarked that while the Act removed any difficulty as to jurisdiction between competent parties regularly served with process, it did not attempt to displace that principle of jurisprudence on which the court rested, *Mallow v. Hinde*, 25 U. S. 12 Wheat. 193 (6:599), and so far as the 47th Rule was concerned, that was only a declaration, for the government of practitioners and courts of the effect of the Act of Congress and of the previous decisions of the court on the subject of that rule. And Mr. Justice Curtis added: 'It remains true, notwithstanding the Act of Congress and the 47th Rule, that a cir-

cuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court, in *Elmendorf v. Taylor*, 23 U. S. 10 Wheat. 167 (6:294), "If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of another state, ought not to prevent a decree upon its merits." But if the case cannot be thus completely decided, the court should make no decree.'

"Mr. Daniell thus lays down the general rule: 'It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose, all persons materially interested in the subject, ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought by service upon them of a copy of the bill, or notice of the decree to have an opportunity afforded of making themselves active parties in the cause, if they should think fit.' 1 Dan. Ch. Pl. and Pr. (4th Am. ed.) 190."

The state of the record was this: (1) there was before the court a petition of the receivers, asking for time to report, and ask instructions upon, the relations with the Denver & Rio Grande; (2) a petition by the receivers as to whether or not they

should bring suit against the Denver & Rio Grande. In both of these matters, the Denver & Rio Grande was certainly interested, and they could not be decided without their presence. In this connection, the language of this court, in a case heard before Judges Gilbert, Morrow, and Hawley (*Consolidated Water Co. v. San Diego*, 93 Fed. 849), it is said:

“From this brief reference to the allegations of the bill, it will readily be seen that the San Diego Water Company has an interest in the subject-matter of the suit, and that any decree that might finally be rendered therein would affect its interest. It is certainly interested in obtaining the relief sought for by the complainant, and would doubtless be entitled, in its own behalf, if so disposed, to bring a suit in its own name, and litigate the same question, in a competent court. Its presence is necessary to a full and complete determination of the questions in controversy in this suit. To determine some of the questions raised by the bill as to the reasonableness of the rates fixed by the ordinance, it will involve an investigation of the management of the affairs of the company. In *Shields v. Barrow*, 17 How. 139, 139, indispensable parties are described as ‘persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.’ See also, *Barney v. Baltimore City*, 6 Wall. 281, 284; *Cunningham v. Railroad Co.*, 109 U. S. 446, 456, 3 Sup. Ct. 292, 609; *Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691.

“In *Gregory v. Stetson*, 133 U. S. 579, 586, 10 Sup. Ct. 422, 424, where the circuit court

entered a decree dismissing the bill for want of proper parties, Lamar, J., in delivering the opinion of the court, said:

“ ‘We are of opinion that the decree of the court below must stand. The rule as to who shall be made parties to a suit in equity is thus stated in Story Eq. Pl. Par. 72:

“ ‘ ‘It is a general rule in equity * * * that all persons materially interested, either legally or beneficially, in the subject-matter of the suit are to be made parties to it, either as plaintiffs or as defendants, * * * so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be grounded upon a partial view, only, of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto.’ See, also, 1 Daniell, Ch. Pl. & Prac. 246 et seq. In the case before us, we are unable to see how any final decree could be rendered, affecting the parties to the contract sued on, without making them all parties to the suit. It is an elementary principle that a court cannot adjudicate directly upon a person’s right, without having him either actually or constructively before it.’

“ ‘See also, *Davenport v. Dows*, 18 Wall. 626; *Bland v. Fleeman*, 29 Fed. 669, 673; *Water Co. v. Babcock*, 76 Fed. 243; *Mangels v. Brewing Co.*, 53 Fed. 513; *Board v. Blair*, 70 Fed. 414, 419.

“The general rule as to parties, as expressed in many of the authorities, is to the effect that all persons should be made parties to a suit in equity who are directly interested in obtaining or resisting the relief prayed for in the bill of granted in the decree. And in a case like the present, where the trial of the suit would necessarily involve the management and conduct of the affairs, and an adjudication of the rights, of the San Diego Water Company, it is essentially necessary that it should be made a party to the suit, either as a plaintiff or a defendant. 1 Fost. Fed. Prac. Par. 42; Gaylords v. Kelshaw, 1 Wall. 81; New Orleans Waterworks Co. v. City of New Orleans, 164 U. S. 471, 480, 17 Sup. Ct. 161; Chadbourn v. Coe, 45 Fed. 822, 825; Gardner v. Brown, 21 Wall. 36, 40; Mallow v. Hinde, 12 Wheat. 193, 198; California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591.”

In this connection, we desire to call attention to the litigation in the case of the Wabash Railroad, as applicable to many of the questions, particularly of procedure, involved here.

In 1862, the Toledo & Wabash issued and sold \$600,000.00 par value of “equipment bonds.” This paper was not secured by any mortgage, deed of trust, or other direct lien upon any property. The Toledo & Wabash was afterwards consolidated, with other railways in the States of Ohio, Indiana, Illinois, and Missouri, into the “Wabash System.” This consolidation was by virtue of the corporation laws of the several states. The constituent companies, and finally the consolidated company, created certain bond issues, secured by mortgages and deeds of trust. Upon default in payment of the interest

upon one of these issues, an action was brought in 1875, a receiver appointed, and a decree directing the sale of the property was made and entered. A sale was made to a bondholders' committee, which formed the Wabash, St. Louis & Pacific Railway Company, and the property was conveyed to this new corporation by the committee. One Ham then brought an action in the United States Circuit Court for the District of Indiana. Ham was the owner of certain of these equipment bonds; and he contended that they constituted a lien upon so much of the property as had formerly belonged to the Toledo & Wabash, and that he was entitled to follow that property through the consolidation, the decree, and the sale. The Circuit Court held with him, but the Supreme Court reversed the decree, declaring that the equipment bonds did not constitute a lien.

Wabash, etc., Ry. Co. v. Ham, 114 U. S. 587.

While this litigation was pending in the Federal Courts, one Compton brought his action in the State Court of Ohio. He was also the owner of a large block of these equipment bonds. He made the same contentions as did Ham, and the *Nisi Prius* Court of Ohio gave him judgment. Upon appeal, this judgment was affirmed by the Supreme Court of Ohio, although that court was constrained to definitively align itself in opposition to the authority of the Supreme Court of the United States in the Ham case.

Compton v. Wabash, etc., Ry. Co., 16 N. E.,
110.

One of the justices of the Supreme Court of Ohio, however, dissented, holding himself bound both by the authority and reasoning of the Ham case.

Compton v. Wabash, etc., Ry. Co., 18 N. E. 380.

This, then, was the state of the record:

1. The United States Circuit Court for Ohio had by its decree of foreclosure, sold the whole property;

2. The United States Circuit Court for Indiana, in the Ham case, had decreed the equipment bonds to be a lien, but this decree had been reversed by the Supreme Court of the United States, and the bonds declared *not* to be a lien;

3. The Supreme Court of Ohio, in the Compton case, had decreed that the bonds *were* a lien, and, ordered the property sold to satisfy them.

James R. Jessup and Edward H. Dixon, trustees under a mortgage of the reorganized Wabash System, brought a suit in the United States Circuit Court of Ohio for the foreclosure of their mortgage. This action was pending and the reorganized road was in the hands of a receiver at the time of the decision of the Supreme Court of Ohio in the Compton case. After the rendition of the judgment, but before execution, the complainants obtained an order of the United States Circuit Court, based upon Section 8 of the Act of Congress of March 3, 1875, making Compton a party, directing that subpoena be served upon him in the District of Co-

lumbia, and requiring him to appear and set up his lien. After Compton's objections to the jurisdiction had been overruled, he answered, setting up the judgment of the Ohio State Court.

The U. S. Circuit Court decreed that he had a lien by virtue of the decision of the State Court, but made it subordinate to the four divisional mortgages on the system. A decree was made, directing sale under the foreclosure, but saving the rights of Compton.

An appeal was taken to the U. S. Circuit Court of Appeals of the Sixth Circuit. The main opinion, by Judge Taft, is exceedingly long, and is found in 68 Fed. 263. The first point to which we desire to call attention, is on the question of jurisdiction. Judge Taft says:

“When the bill was filed in the court below, the property which it was thereby sought to sell on foreclosure was in the possession of receivers appointed by that court in a previous litigation instituted to foreclose mortgages junior to the Knox and Jesup mortgage, and to sell the road to pay all junior liens and floating indebtedness. It is true the litigation had proceeded to foreclosure sale and final decree; but for some reason, not plainly disclosed, the court refused to deliver possession to the purchasers, and retained it in the custody of the court for the purpose of protecting the interests of all the parties to the original litigation. Knox and Jesup wished to foreclose their mortgage, to marshal all liens, to sell the road at the highest price, to preserve the road and its income from waste by the appointment of a receiver. It is manifest that no other court than that in which the receivers then in possession had been ap-

pointed *could grant such relief*. Whether other courts could decree foreclosure and marshal liens, or not, certainly no other court could take possession of and sell the road, *and deliver an unclouded title to a purchaser*. If Knox and Jesup could not file their bill in the court below, then the act of that court in maintaining possession of the mortgaged property through its receivers would result in great injustice to them, and would constitute an abuse of its process. To prevent this, the court below had inherent ancillary jurisdiction, pending its possession of the railroad to hear and determine all petitions for relief presented to it in respect of the possession and control of the road. It is of no importance that the custody of the railroad was likely soon to be changed from the court to the intending purchaser under the previous foreclosure proceedings, at which time any tribunal of competent jurisdiction could give all the relief prayed by Knox and Jesup. Their mortgage was then due. They were not obliged to await the uncertain delays of other litigation before taking steps to assert their rights. They therefore properly appealed to the court below, as the only tribunal which could do so, to give them adequate relief at once; and this was properly accorded to them, without regard to the citizenship of the parties to their bill. The foregoing reasoning is fully supported by many decisions of the Supreme Court. Necessity and comity both require that where, by its officers acting under color of its order or process, a court has taken into its custody property of any kind, another court, though of equal and co-ordinate jurisdiction, should not be permitted either to oust the possession of the first court, or *in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked*. This principle has been laid down by the Supreme

Court of the United States in a long line of cases. Hagan v. Lucas, 10 Pet. 400; Williams v. Benedict, 8 How. 107; Wiswall v. Sampson, 14 How. 52; Peale v. Phipps, Id. 368; Bank v. Horn, 17 How. 151; Pulliam v. Osborn, Id. 471; Freeman v. Howe, 24 How. 450; Youley v. Lavender, 21 Wall. 276; Bank v. Calhoun, 102 U. S. 256; Barton v. Barbour, 104 U. S. 126; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Covell v. Heyman, 111 U. S. 176, 4 Supt. Ct. 355; Heidritter v. Oilcloth Co., 112 U. S. 294, 5 Sup. Ct. 135; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379; Railroad Co. v. Gomila, 132 U. S. 478, 10 Sup. Ct. 155; In re Tyler, 149 U. S. 181, 13 Sup. Ct. 785; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. Rep. 906. Again every court has inherent equitable power to prevent its own process from working injustice to any one, and may entertain a petition by the aggrieved person, *either in the form of a simple motion*, or by intervention *pro interesse suo* in the cause in which the process issued, or by ancillary or dependent bill in equity, and may afford such relief as right and justice require. The existence of such a power, independent of statutory jurisdiction, is recognized by the Supreme Court in Freeman v. Howe, 24 How. 250; Minnesota Co. v. St. Paul Co., 2 Wall. 609-633; Railroad Co. v. Chamberlain, 6 Wall. 748; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. Rep. 27; Pacific R. Co. of Missouri v. Missouri Pac. Ry. Co., 111 U. S. 505, 4 Sup. Ct. 583; Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163; Phelps v. Oaks, 117 U. S. 236, 6 Sup. Ct. 714; Dewey v. Coal Co., 123 U. S. 329, 8 Sup. Ct. 148; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379; Johnson v. Christian, 125 U. S. 642-646, 8 Sup. Ct. 989, 1135; Morgan L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 11 Sup. Ct. 61.

Now, it frequently happens that under the process of the federal courts, exercising the original and lawful jurisdiction conferred expressly by the federal constitution and statutes, possession is taken and control exercised over property in which persons not indispensable parties to the suit have an interest, *by lien, mortgage, and in other ways*. In such cases there often is no diversity of citizenship between such persons and the plaintiff or defendant to the suit which would warrant the federal court in hearing an independent suit between them. But it may be essential, to preserve intact their rights in the property that such third persons should be permitted, at once, to have specific relief, which can only *be granted by a court having possession and control of the property*. And yet, in accordance with the principle already stated, no court but the federal court can exercise possession and control over the property in its custody. Of necessity, therefore, the federal courts exercise an ancillary jurisdiction in such cases; and third persons are permitted to come into the federal court, and set up their interest in the property, and secure the same full and adequate protection and relief to which they would be entitled in any court of competent jurisdiction, were the property not impounded by the federal court."

In upholding the right of the court to compel Compton to come in, the Judge says:

"We come now to the objection that, even if the jurisdiction of the bill be conceded, the court had no power to bring Compton before it. The argument is that the right of the federal court to grant relief to persons claiming an interest in property in its custody, without regard to their citizenship, is founded on its duty to prevent an abuse of its process to the

prejudice of strangers to the suit, and is dependent on the wish of such strangers to secure that relief, expressed in an affirmative and voluntary appeal for the aid of the court, and that no power exists in the court to compel such a stranger to come into court against his will, simply because he claims an interest in the property impounded, if his citizenship would prevent the issue of such process against him in the original suit. Let it be conceded, for the purpose of argument, that the distinction made is a sound one. It does not help Compton. He was not brought into court to prevent prejudice to him by the federal court's possession of the res. He was brought into court to prevent prejudice to Knox and Jesup, who, otherwise having no right to invoke the action of the federal court, did so on the ground that its possession of the res prevented their getting full and adequate relief in the state tribunals, and who were therefore entitled to bring into the case every one whose presence as a party was necessary to give them such relief. They had the right to have the railroad sold free from all liens, so that the purchaser should have an unclouded title, *and this could not be done without Compton's presence*. Compton was not a resident of the district in which the court's ordinary process ran, and he could not be brought in by subpoena. Knox and Jesup's bill was, however, a proceeding against property in the jurisdiction of the court. It was competent for congress, in such a case, to provide for constructive service, which would bind the person against whom it issued to the extent only of the res which lay within the territorial jurisdiction of the court."

Pennoyer v. Neff, 95 U. S. 714;

Heidritter v. Oilcloth Co., 112 U. S. 294, 300,
301, 5 Sup. Ct. 135.

Statutory provision of this kind is found in Section 8 of the act of March 3, 1875 (18 Stat. 470), which was not repealed by the jurisdiction act of March 3, 1887 (24 Stat. 552), or of August 13, 1888 (25 Stat. 433) and is still in force.

It provides:

“That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if said absent defendant had been served with process within the said dis-

trict; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district.'

The meaning of this statute is not doubtful. It applies to every suit of the kind mentioned in the section provided, only, the circuit court of the United States in which the proceeding is taken has otherwise jurisdiction of it. Whether it be a suit arising under the laws and constitution of the United States, or a suit to which the United States is a party, or a suit in which there is a controversy between citizens of different states, or a suit like the one at bar, of which the circuit court has jurisdiction indispensable and ancillary to its original jurisdiction, if it also satisfies the description of the statute, the process therein provided is available. The case of *Brigham v. Luddington*, 12 Blatchf. 237, Fed. Cas. No. 1,874, has nothing in it to conflict with this conclusion. In that case, Circuit Judge Woodruff refused to make an order for substituted process against the owner of the property, because he was a citizen of the same state as the complainant, and his presence as a party would oust the jurisdiction of the court. The bill was an original one, and the jurisdiction could only rest on diverse citizenship. In the suit at bar, Compton's presence as party defendant would not oust the jurisdiction of the court, because as already shown, it is not dependent on diverse citizenship. The circuit court had jurisdiction of the cause otherwise than by virtue of the section above quoted. The suit was brought to enforce a legal and equitable lien on real estate lying in the district, and to remove the cloud of Compton's lien from the title of the purchaser at the foreclosure sale. Compton was therefore properly brought into court by the substituted or

constructive process provided in the section above quoted. *Farmers' Loan & Trust Co. v. Houston & T. C. Ry. Co.*, 44 Fed. 115; *Greeley v. Lowe*, 155 U. S. 58, 15 Sup. Ct. 24."

In holding that the court has the power to compel a party to the action to convey property lying outside its territorial limits, it is said:

"That a court has the power, when it has personal jurisdiction over the mortgagor, to foreclose the mortgage on property lying outside of its territorial jurisdiction, is plain, and is fully established by the case of *Muller v. Dows*, 94 U. S. 44, but it must exercise this power by a decree against the person compelling the mortgagor to convey the equity of redemption. Otherwise the decree is inoperative.

Carpenter v. Strange, 141 U. S. 87, 106, 11 Sup. Ct. 960."

On the point that a junior incumbrancer is entitled to an accounting and credit for income during receivership, and after sale, it is said:

"It remains to inquire how the amount to be paid in redemption of the two divisional mortgages shall be estimated. Of course, the mortgagees are entitled to the principal of their mortgages, with interest to the time of tender; but the more doubtful question is whether the amount thus to be calculated must be reduced by the net earnings of the mortgaged property, i. e., the Ohio division, since the receivers turned over possession of the road to the purchaser. Compton secures his right to redemption through the original mortgagors. Whatever they would have had to pay to redeem the mortgages, he must pay,—no more, no less. It is the general rule that a mortgagee in possession, when his mortgage is redeemed, must

account for the rents and profits during his tenancy. *Russell v. Southard*, 12 How. 139, 155. The Wabash Railroad Company, as the successor in title of the purchasers at the sale, is to be regarded as the first Ohio mortgagee in possession, and therefore liable to account for the rents and profits or net earnings of the mortgaged property, in ascertaining the amount required to redeem the principal and interest of the mortgages. Our view of the saving clause in the decree for sale makes Compton's attitude with respect to the foreclosure sale quite like that of a junior incumbrancer with respect to a sale in a foreclosure proceedings brought by a senior mortgagee, to which the former was not a party. In such a case the weight of authority is that the purchaser is, with reference to the junior incumbrancer, the assignee of a mortgage in possession, and therefore liable to account for the rents and profits. *Jones Mortg.* (5th Ed.), Sec. 1395; 2 *Hil Morg.* 158; *Vanderkemp v. Skelton*, 11 *Paige* 28; *Walsh v. Insurance Co.*, 13 *Abb. Prac.* 33; *Van Duyne v. Shann*, 39 *N. J. Eq.* 6; *Bunce v. West*, 62 *Iowa* 80, 17 *N. W.* 179; *Spurgin v. Adamson*, 62 *Iowa* 661, 18 *N. W.* 293; *Ten Eyck v. Casad*, 15 *Iowa* 524; *Murdock v. Ford*, 17 *Ind.* 52. In two cases a different view has been taken. *Catterlin v. Armstrong*, 79 *Ind.* 514; *Renard v. Brown*, 7 *Neb.* 449; 2 *Jones Morg.* (5th Ed.), Sec. 1118 A.

The theory upon which the last-mentioned cases go, is that, by the defective sale, not only the mortgage passed to the purchaser by assignment, but also the equity of redemption, and the purchaser must be presumed to be holding the property as owner of the equity, rather than as mortgagee, and therefore not to be accountable for the rents and profits. If the purchaser becomes the possessor of the property by the payment of anything substantial over and above the foreclosed mortgage debt, the

argument is a strong one that the rents and profits should be used to recompense him for such an outlay in securing the possession of the property. *Gray v. Nelson*, 77 Iowa 63, 41 N. W. 566. But where, as in the case at bar, the purchase price is equal only to the amount due on the first two mortgages, it would not seem consistent with equity to permit such a purchaser to maintain, against a junior incumbrancer seeking to redeem, that he is receiving the rents and profits as the owner of the equity, rather than as the owner of the mortgages which are galvanized into life to meet and defeat the otherwise good claim of the junior incumbrancer to a first lien. When the sale in this case took place, the mortgaged property was in the hands of receivers,—that is, the mortgagees were in possession—and the rents and profits were applicable to the mortgages in the order of their priority. *Howell v. Ripley*, 10 Paige 43; *Miltenberger v. Railway Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140. If, as to Compton, the sale merely operated as an assignment of the various interests of the parties, the purchaser, as the assignee of the prior mortgages in possession, would seem to have derived his possession, and to maintain it, through the mortgagees, rather than from the owner of the equity of redemption. For these reasons, I think that Compton is entitled to an account of the net earnings of the Ohio Division of the Wabash Railroad Company over and above all operating expenses, including reasonable and necessary repairs, and that this sum should be deducted from the principal and interest due on the two mortgages. Of course, the railroad company is entitled to credit for all taxes paid by it, and for the cash advanced by it, in lieu of the bonds under the first mortgages, to pay receiver's obligations and other expenses properly chargeable as liens against the corpus of the road prior in right to the mortgages."

II.

**THE DISTRICT COURT CLEARLY HAS JURISDICTION TO BRING
IN NEW PARTIES, EITHER ON MOTION OR SUA SPONTE.**

Equity rule 37 provides:

“Any person may at any time be made a party, if his presence is necessary or proper to a complete determination of the cause.”

In *Minnesota v. Northern Securities Co.*, 184 U. S. 199, it is said:

“The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story, Eq. Pl. § 72.

“The established practice of courts of equity to dismiss the plaintiff’s bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court sua sponte, though not raised by the pleadings or suggested by the counsel. *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158; *Hipp v. Babin*, 19 How. 271, 278,

15 L. ed. 633, 635; *Parker v. Winnipsieogee Lake Cotton & Woolen Co.*, 2 Black, 545, 17 L. ed. 333.

“In the case of *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158, the question was fully discussed, and it was shown, upon review of the previous cases, that there are three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. The court in respect to the act of Congress of February 28, 1839, 5 Stat. at L. 321, chap. 36, and to the 47th rule in equity practice said:

“The 1st section of that statute enacts ‘that when in any suit, at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties, who may be properly before it; but the judgment or decree

rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of parties, who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit.'

"This act relates solely to the nonjoinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest, are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it touches suits in equity, we understand it to be no more than a legislative affirmation of the rule previously established by the cases of *Cameron v. M'Roberts*, 3 Wheat. 591, 4 L. ed. 467; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, and *Harding v. Handy*, 11 Wheat. 132, 6 L. ed. 437. For this court had already there decided that the nonjoinder of a party who could not be served with process would not defeat the jurisdiction. The act says it shall be lawful for the court to entertain jurisdiction; but as is observed by this court, in *Mallow v. Hinde*, 12 Wheat. 198, 6 L. ed. 600, when speaking of a case where an indispensable party was not before the court 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity; whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.' So that, while this act removed any difficulty as to jurisdiction, between competent parties regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the 47th rule is only a declaration, for the gov-

ernment of practitioners and courts, of the effect of this act of Congress, and of the previous decisions of the court, on the subject of that rule. *Hogan v. Walker*, 14 How. 36, 14 L. ed. 315.

“‘It remains true, notwithstanding the act of Congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights.’

“*California v. Southern P. Co.*, 157 U. S. 229, 39 L. ed. 683, 15 Sup. Ct. Rep. 591, was a case in several particulars like the present one. There a bill was filed in this court by the state of California against the Southern Pacific Company, a corporation of the state of Kentucky, claiming title and jurisdiction by the state over certain large tracts of land lying upon the shores of the bay of San Francisco and over the harbor waters of said bay, including San Antonio creek, and averring that the Southern Pacific Company claimed adversely to the state, and was engaged in placing structures in and upon said tracts of land, thereby obstructing navigation in the bay and adjoining waters. The bill prayed for a decree quieting the title of the state and enjoining the defendant company from maintaining the structures that it had placed upon said tracts and the adjacent waters. The defendant company answered the bill, denying the ownership of the complainant in the premises in dispute, and setting forth its own title derived from the town of Oakland, as to the whole of the water front of that town, through one Carpentier, as grantee of said town by ordinance and deed of conveyance, and claiming that by subsequent mesne conveyances the said title and property

had become vested, as to a part thereof, in the Central Pacific Railroad Company, and, as to another part, in the South Pacific Coast Railway Company, and in the defendant company as lessee. It further was claimed that certain ordinances and deeds of the town of Oakland operated as a grant by the city of Oakland and the state of California of the land to the Oakland Water Front Company, as grantee or alienee of Carpentier. The case was duly put at issue, and a commissioner was appointed to take testimony therein and to return the same to the court.

“When the case came on for hearing it was held by this court that the city of Oakland and the Oakland Water Front Company were so situated in respect to the litigation that the court ought not to proceed in their absence. In reaching this conclusion the court reviewed the cases, including the cases above cited and others.

“Upon the contention that the city of Oakland and the Oakland Water Front Company might be made parties defendant, and the cause thus enabled to proceed with the case, the court held that this could not be done, because this court could not exercise original jurisdiction in a suit between a state on the one hand and a citizen of another state and citizens of the complainant state on the other. Accordingly, the bill was dismissed for want of parties who should be joined, but could not be without ousting our jurisdiction.”

When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it

likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Section 2 of Article 3 of the Constitution of the United States.

In the early case of *Caldwell v. Taggart*, 4 Pet. 190, the Supreme Court said:

“In reply to all these grounds of reversal, for want of parties, or for want of due maturation for a final hearing, it has been urged that nothing is ordered to be mortgaged or sold beside Caldwell’s own interest, whatever that may be. But this we conceive to be an insufficient answer. It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decrees should terminate and not instigate litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has the means of reducing every right to certainty and precision, and is therefore bound to employ those means in the exercise of its jurisdiction.

“There is no want of learning in the books on this subject. The general rule is laid down thus: ‘However numerous the persons interested in the subject of a suit, they must all be made parties plaintiffs or defendants, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit to make the performance of the order perfectly

safe to those who have to obey it, and to prevent future litigation.' And again, 'all persons are to be made parties who are legally or beneficially interested in the subject-matter and result of the suit,' extending in most cases to heirs-at-law, trustees and executors.

"Thus, in a case in which a remainderman in tail brought a bill against the tenant for life to have the title deeds brought into court, and there were annuitants on the reversion, and a child interested under a trust term of years prior to the limitation to the plaintiff—that is, incumbrances prior and posterior to the plaintiff—Lord Hardwicke (3 Atk. 570) refused a decree without first making them parties. So, where husband tenant for life, remainder to his wife for life, remainder over, brought his bill without joining the wife, the objection was made and sustained on the ground that if there was a decree against the husband, it would not bind the wife. (1 Atk. 289).

"So, if an under mortgagee brings his bill to foreclose the original mortgagor, he must make the first mortgagee a party. (3 P. W. 643.) This is the relation in which the complainants here seek to place themselves in reference to Mr. Singleton.

"And there are various cases in which, though the heir-at-law is not a necessary party, he is made such in practice, and the reason assigned is to free the estate from every blame that may lessen its value at the sale. (2 Ves. 431; 3 P. W. 91; 3 Br. Ch. Rep. 229, 365.)

"And so in cases of indefinite or blended interests, all the participators are necessary parties; as where a residue is devised to several, or even devised by specified shares.

"It is clear, then, that this cause must go back as well to have the necessary parties made as to have the decree reformed and reduced to legal precision.

"It is true this course might have been avoided if this court, upon looking through the complainants' case and allowing the full benefit of everything that has been legally established, had seen that a decree might now finally be rendered against the appellant. It would then have been nugatory to send it back for parties. But such is not the conclusion to which this court has arrived; it has already expressed the opinion that to a certain extent it is a very clear case for relief, and all the difficulties arise upon the nature of the relief prayed and granted. There is no knowing what new aspect may be given to the cause, when all the necessary parties come in and answer. But as it is now presented, had the prayer for specific relief upon the Sulphur Springs been out of the cause, it would not have been sent back without such a decree against the defendant, Caldwell, as the court, below ought to have rendered."

III.

THE DENVER AND RIO GRANDE IS A NECESSARY AND PROPER PARTY FROM EVERY POSSIBLE POINT OF VIEW.

It would seem clear that no decree can be entered in this case which will not affect the Denver & Rio Grande: (1) because it is elementary that the decree *nisi* must direct the terms upon which the property of the Western Pacific shall be sold—that is, either burdened by, or free from the covenants of Contract "B"; (2) because the final decree must direct how the proceeds of the sale are to be distributed. This involves a construction of that portion of the First Mortgage to the effect that money derived from a sale shall be applied "without prefer-

ence or priority of principal over interest or of interest over principal.”

First Mortgage, Article V, Section 10.

Section 10. The purchase money, proceeds or avails of any sale of the mortgaged and pledged premises and property, together with any other moneys which may then be held by the Trustee or be payable to it under any of the provisions of this indenture as part of the trust estate, shall be applied as follows:

First. To the payment of the costs, expenses, fees and other charges of said sale, and a reasonable compensation to the Trustee, its agents and attorneys, and to the payment of all expenses, liabilities and advances incurred or disbursements made by the Trustee, and to the payment of all taxes, assessments or liens prior to the lien of these presents, except any taxes, assessment or other superior liens subject to which such sale shall have been made.

Second. To the payment of the whole amount due, owing or unpaid upon the bonds hereby secured for principal and interest, with interest on the overdue installments of interest at the rate of five per cent. per annum, and, in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest without preference or priority of principal over interest or of interest over principal or of any installment of interest over

any other installment of interest, ratably, according to the aggregate of such principal and to the accrued and unpaid interest.

Third. Any surplus then remaining to the Railway Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

The Denver, of course, is vitally interested in this distribution of the funds, because its liability, *pro tanto* depends upon it; (3) because the decree *nisi* must fix the upset price, and upon that price is very apt to depend the amount of the deficiency judgment, and therefore the amount of the Denver's future liability.

But the property of the Western Pacific is tied up to the Denver & Rio Grande in other matters which are vital to both roads:

1. Is the Western Pacific to be sold, subject to those provisions of Contract "B," which make it, so far as traffic is concerned, a mere extension of the Denver & Rio Grande? When the receivers, or the referee, or the special master offer it for sale from the auction block, that is the first thing a prospective bidder will inquire about. On the one hand, it is likely that the Union Pacific, or the Chicago & Northwestern, or the Burlington, might hesitate to bid for a property which was bound to deliver all its traffic to the Denver. On the other hand, an independent bidder might hesitate to buy a road which ends at Salt Lake, and with no traffic arrangements to the East. So that the decree *nisi*

in directing a sale, must direct whether or not the property is to be sold, subject to Contract "B," or freed from it—and the Denver is a necessary party to the determination of that question.

2. In the same manner, the Western Pacific, by Contract "C," is tied up to the Missouri Pacific, through the Denver & Rio Grande. The parties to Contract "C" are the Missouri Pacific and the Denver & Rio Grande. It provides that the two parties shall deliver, each to the other, all traffic originating on the roads; and in addition, the Denver agrees to deliver to the Missouri Pacific, all traffic originating on the Western Pacific.

This contract further provides:

And whereas, the railway line of said Pacific Company hereinbefore mentioned will, when completed from San Francisco to Salt Lake City, furnish a new outlet to the Pacific Coast for west-bound traffic carried by the parties to this agreement, and said Pacific Company will then be in a position to make substantial contributions of east-bound traffic for the said joint through line hereinabove provided for; and,

Whereas, the Pacific Company has entered into a traffic agreement with the Denver Company and the Western Company for the establishment and maintenance of a joint through line over their several connecting railways between San Francisco on the west and Pueblo on the east, but upon the express understand-

ing that the Missouri Company and the Denver Company shall simultaneously enter into this agreement; and,

Whereas, the Pacific Company, for the purpose of raising capital wherewith to complete and equip its said railway, has authorized an issue of Fifty Million Dollars of its First Mortgage Five Per Cent. Thirty-year Gold Bonds, and has secured the same by Mortgage to Bowling Green Trust Company, Trustee, the same bearing date Sept. 1st, 1903; and,

Whereas, the establishment and the continued and effective maintenance of the traffic relations established by this agreement between the Missouri Company and the Denver Company, parties hereto, are of substantial benefit and advantage to the Pacific Company by reason of the railway connection as aforesaid at Salt Lake City and by reason of the traffic agreement aforesaid between the Denver Company and the Western Company on the one hand, and the Pacific Company on the other; and,

Whereas, the establishment and the continued and effective maintenance of the traffic relations established by said hereinbefore recited agreement between the Denver Company and the Western Company on the one hand and the Pacific Company on the other hand, are of substantial benefit and advantage to the Missouri Company by reason of the furnishing of additional business for the joint line of the

Denver Company and the Missouri Company created by this agreement;

Now, therefore, in further consideration of the premises and of the mutual covenants and agreements herein set forth, it is hereby further covenanted and agreed by and between the parties to this agreement, to wit, the Missouri Company and the Denver Company, as follows:

1. This contract is made not only for the mutual benefit of the parties hereto, but also for the benefit of Western Pacific Railway Company, being the Pacific Company aforesaid.

2. The Pacific Company having a beneficial interest in this contract and in the continuance of operations thereunder, said Company, and its successors and assigns, shall have the right to enforce specific performance of this agreement and of each and every part thereof (whatsoever the nature of any provision thereof may be), for and during the entire term hereinafter provided.

3. The said traffic contract between the Denver Company and the Western Company of the one part, and the Pacific Company of the other part, and the continuance of operations thereunder being of substantial benefit and advantage to the Missouri Company, said Missouri Company and its successors and assigns shall have the right to enforce specific performance of said agreement and of each

and every part thereof for and during the entire term thereof; but nothing in this section contained shall be taken to authorize any action that shall have the effect of impairing in any manner or to any extent the lien or security of said First Mortgage of the Pacific Company or of preventing, obstructing or interfering with the exercise of any of the remedies thereby granted to the Trustee, or to prevent the modification or termination of said traffic contract in the manner therein provided therefor or to impair or qualify the right of the Denver Company to enter into any agreement, in its own absolute discretion, abrogating, or modifying any provision or provisions thereof in accordance with the provisions in that behalf therein contained.

4. All of the rights of the Pacific Company under this agreement may by said Pacific Company, be effectively pledged by assignment thereof to Bowling Green Trust Company, Trustee, under the first mortgage of the Pacific Company.

5. The Trustee for the time being under the said first mortgage of the Pacific Company, at all times, both prior to and after default under said mortgage, shall have the right to enforce specific performance of this agreement, and each and every part thereof, by each and both of the parties thereto, and to enforce this agreement by suits in equity or actions at law

or otherwise as it may deem appropriate from time to time.

6. This contract shall be and continue in full force and effect from the date of executing the same and until all of the Fifty Million Dollars of First Mortgage Five Per Cent. Thirty-year Gold Bonds of the Pacific Company, principal and interest, shall be fully paid, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided in the First Mortgage of said Pacific Company, and this said contract shall run with the railways of each and both of the parties hereto and shall accrue to the benefit of and be binding upon them and their respective successors and assigns.

It will be remembered, that this contract was one of those referred to in the preliminary agreement between the Denver and the Western Pacific, and was specifically pledged under the First Mortgage. So that, if and when the road is sold, the interlocutory decree must determine whether it is to be delivered free from Contract "C," or bound by it. And in the determination of *that* question, both the Denver and the Missouri Pacific are necessary parties.

3. By the provisions of Contract "A," the Denver agrees by the purchase of second mortgage bonds, to furnish the money necessary to complete and equip the Western Pacific. So far as the com-

pletion of the road is concerned, this contract was carried out. But it was certainly never carried out as to equipment. The schedule attached to, and made a part of Contract "A," reads:

Equipment:

"This will consist of locomotives of different classes, modern design and best construction. Also cars of various classes and modern design for passenger train service, and cars of various classes and suitable design for freight service, the aggregate cost of the Equipment being not less than \$3,000,000."

But the Western Pacific owns no passenger cars at all, and practically no freight equipment. It is supplied with both passenger and freight cars by the Denver, under leases, by which the Western Pacific pays large rentals. Now, Contract "A" is also pledged under the First Mortgage; it is an asset in the hands of the receivers; and there is a grave question, as to whether or not the Denver is not compellable to provide both passenger and freight cars; or at least, an involved accounting is necessary of the proceeds of the Second Mortgage bonds—and again the Denver is a necessary party.

(See Report of Receivers' Exs. "H," "I" and "J.")

4. The freight terminals used by the Western Pacific in Salt Lake, are the property of the Denver & Rio Grande. These terminals are held un-

der a lease, which is to run as long as the First Mortgage bonds are unpaid. This lease is also pledged to the Trustee under the First Mortgage. Again, if the property is to be sold, it is necessary to determine whether it is to be sold subject to this lease, and the Denver is a necessary party to the determination of that question.

(See Receivers' Report, Exhibit "G.")

5. The passenger terminals in Salt Lake City belong to a separate corporation, the Salt Lake City Union Depot and Railroad Company. They consist of an imposing and convenient union depot, and extensive and commodious yards. The stock of this corporation is owned by the Western Pacific and the Denver, the latter owning one share more than the former. This Depot Company has an outstanding bond issue, of which the Bankers' Trust Co. is trustee. There is a contract between the Denver and the Western Pacific, by which each pays one-half the interest on the bonds, as well as other expenses. This agreement is pledged under the Deed of Trust of the Depot Company, and the Denver and the Western Pacific; each guarantee one-half of the interest on its bonds.

(See Receivers' Report, Exhibits "K" to "P.")

So that, under these arrangements, it must be determined: (a), whether or not the property of the Western Pacific is to be sold subject to this lease; (b), how far the Western Pacific's guaranty of the bonds or the Depot Company is a lien on its property; (c), the rank of that lien, if it exists, *and the*

highly important and interesting questions as to whether or not this guaranty of one-half of the interest on the Depot Company's bonds takes precedence over the lien of the Western Pacific's First Mortgage; and whether or not the Denver is not bound by Contract "B" to pay this, as a necessary operating expense.

In any event, it makes the Denver, again, a necessary party.

6. In February, 1910, another contract was entered into between the Denver and the Western Pacific. It reiterates Contracts "A" and "B," and agrees to continue to supply sufficient money to fully carry out the provisions of those documents. This latter contract, however, recognizes that inasmuch as the capital stock of the Western Pacific is only \$75,000,000.00, that it cannot lawfully create any indebtedness above that amount. However, it was already indebted \$50,000,000.00 on the First Mortgage Bonds, and \$25,000,000.00 on the Second Mortgage. Accordingly, by this contract, it was agreed that moneys advanced by the Denver should not constitute a "present indebtedness," but should only become a debt when the capital stock should be increased.

(See Receivers' Report, Exhibit "Q.")

Now, the effect of this agreement upon the Western Pacific, is also of great importance from two points of view:

1. It reiterates the covenant to make up all sums necessary under both Contracts "A" and "B";

2. It postpones any claim for sums so advanced, until the Western Pacific can lawfully create the indebtedness.

Under Contract "A," the Denver agreed to purchase the entire issue of \$25,000,000.00 Second Mortgage bonds at 75, in order to provide money for the completion and equipment of the road. In order to consummate this transaction (as well as to raise other moneys), the Denver created its First and Refunding Mortgage, as security for an authorized issue of \$150,000,000.00 Five per cent. bonds. Then in August of the same year (1908), the Denver and the Western Pacific made an agreement with the Bowling Green Trust Company by which \$10,863,000 of the Western Pacific's Second Mortgage Bonds were pledged as security for the Denver's First and Refunding Bonds; this transaction, as this latter agreement shows, was in furtherance of a contract between the Denver and three New York banking firms, Blair & Co., Solomon & Co., and Read & Co., by which the bankers purchased the Denver's convertible notes in the sum of \$10,000,000 and took as security \$15,000,000.00 of the Denver's First and Refunding Bonds. The money realized from these notes was largely used by the Denver in the purchase of Western Pacific Second Mortgage Bonds. Section 7 of this

contract specifically recognizes the existence of Contract "B".

(See Report of Receivers, Exhibit "R.")

In July, 1909, the Denver and the Western Pacific entered into a further contract with the Equitable Trust Company. This contract recites that *by its very terms* the Denver's First and Refunding Mortgage provides that \$23,000,000.00 of the bonds secured by it may be used to purchase Western Pacific bonds in accordance with Contract "A". This agreement provides that \$6,100,000.00 further Western Pacific Second Bonds shall be deposited with the Trustee of the Denver's First and Refunding Mortgage.

(See Report of Receivers, Exhibit "S.")

Then, in May, 1912, the Denver created its Adjustment Mortgage, as security for an authorized issue of \$25,000,000 seven per cent bonds. This mortgage, by its terms, recognizes the liability of the Denver under Contract "B".

It would seem then, that purchasers of the Denver's First and Refunding Fives and its Adjustment Sevens, had ample notice of its obligations to the Western Pacific; to the determination of that vital question, affecting the ranks of the lien of Contract "B", the Denver is also a necessary party.

One of the vital questions concerning Contract B is whether or not it constitutes an equitable mortgage on the properties of the Denver and Rio Grande. If it does, then, unquestionably, the first

mortgage is a mortgage upon two distinct units of property: (1) The railroads and property of the Western Pacific, and (2) the railroads and property of the Denver and Rio Grande.

If this is true, then it is elementary that under the law of California, a decree foreclosing a lien as to one of those units would extinguish the lien as to the other, but the question as to whether as a matter of law it does constitute a lien upon the properties of the Denver is not the real question involved in these proceedings, in this: that the District Court at its peril must determine whether or not it does so constitute a lien, for the reason that if it does, then that lien will be extinguished. It is clear, therefore, that the question whether or not it does constitute a lien cannot be determined without the presence of the Denver and Rio Grande.

Furthermore, the Denver is a necessary party from still another point of view. Subsequent to the execution and pledging of Contract B, the Denver executed a mortgage known as the adjustment mortgage, upon which was issued ten million dollars' worth of bonds. That adjustment mortgage contains a specific provision that the obligations of the Denver under Contract B shall be subordinate to the adjustment bonds.

In other words, the Denver and Rio Grande, after it had executed Contract B, which in terms was a lien on its railroad, creates another lien upon its railroad, which lien provides that it shall be superior to the former lien of Contract B. In mar-

shaling the assets, it is necessary for the District Court here to determine the effect of this provision. In other words, the District Court must marshal the liens and establish their priority. The claim of the Denver and the Trustee under its adjustment mortgage, that it has a prior lien over Contract B is a claim which cannot be adjudicated without the presence of both the Denver and its Trustee. During the oral argument, the solicitor for the plaintiff conceded as follows:

“Your Honor asked me at the last argument whether I didn’t think this court had jurisdiction over the operating part of Contract B. I said that I thought it had. I am no less firmly convinced now than I was then that it has. I don’t think that the Trustee has any power and I think if it seeks to exercise the power this court would restrain it from interfering with the balance of Contract B, that is the operating agreement, or the covenants with the Western Pacific Company itself, unless it shall do so through this court, because this court has that part of that contract in its possession and under its control and I think should exercise that control itself.”

But under the terms of Contract B the Denver and Rio Grande has several rights directly affecting the property:

(A) The right to force the Western Pacific to deliver to the Denver all of its traffic;

(B) The right to compel the use of the main line of the Western Pacific for one through passenger train a day;

(C) The right to compel the Western Pacific to apply all of its net earnings to interest and sinking fund. It is true, that as to the purely traffic arrangements, the Trustee is granted the right by Contract B and the deed of trust to abrogate these provisions. It is equally true that it has not done so. It is likewise equally true that the District Court has the right and it is its duty to determine those provisions of the deed of trust the same as any other provisions, and the Denver is a necessary party to any such attempted determination. It is likewise true, that neither Contract B nor the deed of trust give any power to the Trustee to abrogate that portion of Contract B by which the Western Pacific agrees to use all of its net earnings for interest and sinking fund, and it is absolutely necessary for the District Court in its decree to determine whether or not the property will be sold freed from that burden or subject to it, and the Denver is certainly an interested party in the determination of that question.

Furthermore, the Denver is a party also to Contract C. Mr. Bowie in his argument, page 287 of the record, states:

“Contract C has been violated constantly by all parties concerned in it ever since it was made. Nobody has ever lived up to the provisions of Contract C. They have been utterly disregarded or thoroughly violated.”

Mr. Krech, president of the plaintiff and chairman of the Reorganization of the Committee, on page 20 of exhibit 21, attached to the petition for the

writ of prohibition, states that in his opinion, Contract B established two sets of rights and choses in action; one in favor of, and enforceable by the Western Pacific Company, and another in favor of and enforceable by the Trustee under said Western Pacific Company's first mortgage for the benefit of the holders of the bonds secured thereby; that the Western Pacific Company's rights are pledged under said first mortgage as security for the payment of its said first mortgage bonds.

Admittedly, then, the right of the Western Pacific to demand from the Denver moneys sufficient, not only to make up deficiencies in sinking fund, but also in operating expenses, and all other moneys necessary to insure the continued operation of the road and to retain unimpaired the lien of the first mortgage, was the right of the Western Pacific pledged under its first mortgage, and has been placed in the custody of the receivers.

Admittedly, also, the right to compel the Denver and Rio Grande to turn over all traffic to the Western Pacific was pledged under the first mortgage, and is the subject of foreclosure.

Therefore, when the court comes to frame a decree, it must define the extent—

(1) To which the Western Pacific can compel the Denver to make up deficiencies;

(2) The right to compel the Denver to turn over to the Western Pacific all of its traffic.

And here, again, it is apparent that the Denver and Rio Grande has an interest in the determination of these questions.

It appears from the record, the affidavits and from the ancillary and dependent bill filed in New York, that large sums have been diverted by the Western Pacific and applied to improvements and capital expenditure. Upon its face, this was a very evident violation on the part of the Western Pacific of its contract with the Denver and Rio Grande. It may be, of course, that it will be shown, when the time comes, that these diversions were sanctioned and acquiesced in by the Denver and Rio Grande, for the reason that it appears that the Denver and Rio Grande was the owner of almost all of the stock of the Western Pacific and in complete control of its board of directors. However that may be, it is apparent that the Denver and Rio Grande has a direct interest in the very physical properties of the Western Pacific. Were it not for such acquiescence it might be argued that this money which had been invested in actual physical properties and had thereby gone to increase the security of the bondholders, was a credit to come out of the corpus for the Denver and Rio Grande, or, at least, to reduce its liability. This is distinctly recognized in the dependent bill filed in New York. However that may be, it is evident that the Denver and Rio Grande is a party interested in the question as to whether or not it should be allowed this credit in the sale of the physical properties of the

Western Pacific. Counsel for the Bondholders Committee, on the oral argument said:

“The Denver Company has, during the entire existence of this contract, paid to the Trustee, not the difference between the gross earnings of the Western Pacific and the money which was necessary, plus gross earnings, to make up these sums, but the difference between the sum actually paid into the Trustee by the Western Pacific, and the sum actually necessary to make up the interest.”

There can be no question that the amount of the Denver's future liability is dependent upon the amount realized from the sale of the physical properties. The Denver is, therefore, directly interested in another question, namely, the question of the upset price and the terms of the sale. In other words, if the property should sell for fifty million dollars, the Denver would not have to pay a cent. If it should sell for only ten million dollars, the Denver's liability would be on the remaining forty million. The Denver is, therefore, directly interested in the question as to what the upset price should be.

Dated, San Francisco,

March 15, 1916.

Respectfully submitted,

GARRET W. McENERNEY,

JOHN S. PARTRIDGE,

Attorneys for Respondent.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

Ex parte Equitable Trust Company of
New York, Original No. 169.

In the Matter of the Petition of The
Equitable Trust Company of New York,
as Trustee, for a Writ of Mandamus,
Original No. 2757.

In the Matter of the Appeal of The
Equitable Trust Company from the
Order Issuing the Injunction, dated
February 21, 1915.

**Supplemental Brief of Petitioners
and Appellants.**

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Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

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SUPPLEMENTAL BRIEF OF PETITIONERS
AND APPELLANTS.

THE CONTENTION OF COUNSEL FOR RECEIVERS AND
RESPONDENTS THAT, EVEN THOUGH THE LOWER
COURT HAS ERRED, AND HAS EXCEEDED ITS AU-
THORITY, NO REMEDY CAN BE FOUND IN THESE
PROCEEDINGS, IS BASED ON A MISCONCEPTION OF
THE RECORD, AND IS UTTERLY UNFOUNDED.

TRUE CONDITION OF THE CAUSE.

On February 21, 1916, the lower court made an
order directing that the Denver & Rio Grande be

made a party to the suit in foreclosure, in order that the guaranty of interest and sinking fund contained in "Contract B" might be enforced against that Company. This order was made in an action brought solely for the foreclosure of the Mortgage on the properties of the Western Pacific.

In addition to the authorities heretofore cited, showing that the order in question is void, we beg leave to refer the Court to the following cases:

Towle Brothers v. Quinn, 141 Cal., 385.

In this case the Court said:

" . . . We think that in this action to foreclose a mortgage, which is based on Section 726 *et seq.* of the Code of Civil Procedure, the court had no power to reach its hands over into the separate and independent action for participation, and take control and jurisdiction of such action. It had merely jurisdiction to foreclose the mortgage sued on, and order the mortgaged premises sold, and to foreclose the rights of all parties holding under and subject to the mortgage."

In *Joy v. Jackson & Michigan Plank Road Company* (11 Michigan, 155), the Court held that:

"Sureties who have undertaken, not for the payment of the mortgage debt, but that the mortgagor shall provide a *sinking fund* in certain specified securities for its payment, cannot be joined as defendants in a suit to foreclose the mortgage."

In *O'Connor v. Nadel* (23 Southern, 532), the Su-

preme Court of Alabama held that "a bond given to
 "a mortgagee on the same day the mortgage was
 "given, but not executed by the mortgagor, though
 "given to secure the same debt, is no part of the
 "mortgage, and those who signed the bond are not
 "necessary parties in an action to foreclose the mort-
 "gage."

The Court of Appeals for the Eighth Circuit has declared:

"The pendency in a state or other court of an action *in personam* which involves no issue of which the federal court has acquired exclusive jurisdiction, no claim to or lien upon specific property in the possession or under the dominion of a federal court of equity, presents no ground to sustain a dependent bill to stay the action."

"The subject of a suit to foreclose a mortgage is the specific property mortgaged. Its object is the subjection of all liens thereon to that of the mortgage and the application of the specific property to the payment of the mortgage debt."

Guardian Trust Co. v. Kansas City Sou. Ry.,
 146 Fed., 337.

In *Steele v. Grove* (67 N. W., 963-5), the Supreme Court of Michigan said:

"1. The relator was not a party to the foreclosure suit. It is true that he might be made a party under the provisions of section 6704, How. Ann. St., so that an execution for deficiency might have been issued against him, as well as the mortgagor, for any balance of the debt remaining unsatisfied

after a sale of the mortgaged premises. This section of the statute does not make it mandatory upon the plaintiff to make one who is a mere endorser upon the note a party defendant in the mortgage foreclosure. The statute is simply permissive. Under the original equity jurisdiction, there was no power to make personal decree against even the mortgagor himself; but this is a statutory innovation, as is also the enforcement in the foreclosure suit of the collateral obligations of third persons, and the jurisdiction by the statute over this latter class of persons is permissive only, and not obligatory. *Johnson v. Shepard*, 35 Mich., 115. It is true that upon foreclosure, where one is not primarily liable upon the mortgage debt, no personal liability can be enforced against him until the land is sold and the deficiency reported. *Howe v. Lemon*, 37 Mich., 164."

See also:

Johnson v. Shepard, 35 Mich., 115.

There is, we submit, no doubt that the Court had no right to inject into the foreclosure proceeding an action against the Denver Company, in order that its liability for interest and sinking fund might be enforced. This, however, is exactly what the Court did. The order of February 21, 1916, was made for the purpose of bringing the Denver Company in so that the rights of the Trustee and Bondholders against that corporation to recover from it the interest and the sinking fund might be enforced in this proceeding. Though this order is void, the lower court refuses to hear the cause presented by the pleadings, or to make a decree, though the cause is ripe for

decree, the refusal being predicated on the existence of the void order. No other ground for the refusal to enter the decree forthwith has been suggested either by the Court or by the Receivers, and *it is conceded by the Court that the decree should be entered forthwith if this order be void.* The following extracts from the transcript of the proceedings annexed to the petition for mandamus demonstrate that such is the fact:

“MR. PARTRIDGE— . . . The reason, and the only reason why the Receivers want to be heard or to object to the application of Mr. How here today, is this: That they believe that this guarantee of the Denver & Rio Grande Railroad is a mortgage upon its property, that this mortgage is prior and superior to its first and refunding Fives, and to its adjustment Sevens, and that that can be established thoroughly in this court with the proper parties before it, that that lien is superior to the lien of those two interests in the amount of \$43,000,000. Furthermore, if that can be established in this court by the Receivers, or the Equitable Trust Company, that that, together with the earnings of the Western Pacific, will be more than sufficient to pay the full interest on the bonds of the Western Pacific and the sinking fund besides.”

On the hearing the Court declared, in speaking of the same subject:

“If it has jurisdiction, Mr. How, I think the Court has intimated sufficiently throughout the long argument that was had, and the discussion of that order to show cause, and what it says in its opinion as well, that in its view there can be no

competent marshaling or fixing of the value of this property for the purpose of sale, for the essential purpose of fixing an up-set price, without construing the extent and character of the guarantee given in that contract by the Denver & Rio Grande, because if that contract carries a right of protection to the extent that is contended on one side that it does, it might never be necessary to sell the property of the Western Pacific,”

and Mr. How thereupon stated:

“That protection has not been afforded it—if it had been the mortgage of the Western Pacific would not have gone into default.”

“THE COURT—That does not answer the question. *The question is what are the rights of the bondholders of the Western Pacific under that contract, and if they are such as are seriously claimed for them, counsel can readily perceive that if the Denver & Rio Grande can be held responsible, and is able to respond, there would be nothing left here as requiring a sale of the physical properties of this road to meet those obligations.*”

And again the Court declared:

“*If the Court of Appeals shall determine that this Court is wrong in its view that Contract B must be interpreted here and may be disposed of like any other piece of physical property that is pledged under a mortgage there will be no difficulty at all in wiping the slate clean in a very quick and expeditious way, thus disposing of all the difficulties. All I desire to see is that the jurisdiction of this Court is exercised in a manner so as to leave no stain on the question of its having protected those whose rights are before it for protection.*”

And again:

"THE COURT—I am inclined to think that if you take a different view from that of this Court that it should have the advice of the Circuit Court of Appeals under your application for a writ of prohibition as to whether it is right in the order it has issued bringing in the Denver & Rio Grande as a party to this action with a view of construing competently the provisions of Contract B, that that would be a very proper course to pursue."

The position of the lower court as shown by the record is this: The lower court has made an order directing that there be submitted to it a controversy concerning which its jurisdiction has not been invoked by the parties. It has declined to enter a decree in the cause submitted to its jurisdiction and will not enter a decree until the controversy over which it has no jurisdiction is disposed of or the advice of the Court of Appeals concerning the correctness of the decision bringing in new parties is obtained. The case is, in legal essence, no different from the Morris case. There the Court refused to go to a decree until a decision had been rendered in the State's court construing a State statute. Here the Court refuses to go to a decree until it has rendered a decision on a question over which it has no jurisdiction. In both cases there is a refusal to act for a cause insufficient in point of law.

The Judicial Code provides (Sec. 262):

"The supreme court and circuit courts of ap-

peal, and district courts, shall have power to issue all rights not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

In *ex parte Metropolitan Water Company* (220 U. S., 539), the lower court vacated a restraining order which it had no jurisdiction to vacate. There was no appeal from such order. The Supreme Court said:

"This being the case, it necessarily follows that mandamus is the proper remedy, since the section made no provision for an appeal from an order made by a single judge denying an interlocutory injunction and the right of appeal is not otherwise given by statute."

It is obvious that if a cause cannot be kept in the lower court for all eternity by orders directing that there be litigated therein, matters over which the lower court has no jurisdiction, a writ of prohibition enjoining the enforcing of such an order and a writ of mandate compelling the entry of a proper decree are both authorized by the Judicial Code and by the decisions of the courts:

Ex parte Metropolitan Water Co., 220 U. S., 539;

Barber Asphalt Paving Co. v. Morris, 132 Fed., 945;

McClellan v. Carland, 217 U. S., 268;

In re Rice, 155 U. S., 396;

In re Dennett, 215 Fed., 673.

THE CLAIM THAT EQUITY RULE 37 SANCTIONS THE
MAKING OF AN ORDER SUCH AS THAT HERE MADE
IS WITHOUT FOUNDATION.

Rule 37 provides: "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

The clause of the Rule declaring that "any person may be made a party if his presence is necessary to a complete determination of the cause," does not give to the Court the power to make the person a party

upon its own motion, and without an amendment of the pleadings.

Statutes allowing parties to be brought in by the Court on its own motion have no such effect, for, as said in *Doke v. Williams* (34 So., 569) :

“To make a new defendant to a bill, claiming in a right not noticed by the bill, would throw the rules of chancery pleading into utter confusion, for it would be to try rights without any issue between the parties.”

The rule, however, does not purport to authorize the Court to act on its own motion, or to set aside settled principles of equity. Indeed, the rule, by necessary implication, denies to the Court power to require the presence as a party of one not necessary to a proper and complete determination of *the cause presented by the pleadings*. Certainly the rule does not abrogate the rights granted by Rule 42, which provides:

“Rule 42. JOINT AND SEVERAL DEMANDS—In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.”

Rights created and recognized by rules of equity, such as this, are not abrogated even by rules author-

izing the addition of parties to a cause by the Court of its own motion:

THE RECEIVERS ARE NOT NECESSARY PARTIES TO THE APPEAL, NOR IS THE ORDER APPEALED FROM AN ORDER IN CONTEMPT. IT IS AN INJUNCTION.

On June 11, 1915, the District Court made an order reciting that the Receivers had filed in the court a contract between the Denver & Rio Grande and the Western Pacific Railway, together with other contracts, and asked six months' time to investigate all things in connection with the contract and to report this to the Court with their recommendations or advice. It is also recited that an action on Contract B has been commenced in New York against the Western Pacific and Denver & Rio Grande Railways, such action having been commenced on the 27th of May, 1915. It is further recited that on June 3rd, 1915, the Receivers filed a petition requesting instructions as to whether or not they should sue the Denver & Rio Grande Railroad on Contract B. It is then ordered that the Equitable Trust Company of New York appear before the Court on the 21st of June, 1915, and show cause, if any it has, why it should not be enjoined and restrained from further proceedings in the suit in New York. It is further ordered that in the meantime and until the hearing and determination of the order to show cause the Equitable Trust Company be restrained from further proceedings in the New York suit.

The foregoing matter appears in "Exhibit 19" of the Petition for Prohibition.

Prior to the hearing of the order to show cause the Equitable Trust Company filed its answer. The answer presented the primary objection that the order to show cause was not founded on any petition or pleading. The answer continued, declaring that the Court was wholly without jurisdiction to enjoin the complainant from proceeding on Contract B, declaring that the complainant had not sought, and did not seek by its suit in New York to do anything other than enforce the liability of the Denver & Rio Grande Railroad under Contract B; that the action pending in the District Court of California was an action to foreclose a mortgage and nothing else, and that the issuance of such restraining order would constitute an unlawful taking of property; that the complainant claims a right under the Constitution and Laws of the United States to select the forum in which it chooses to enforce its right under Contract B, and that this constitutional right was not surrendered by invoking the jurisdiction of the District Court of the United States for the Northern District of California by the suit in foreclosure. The answer sets up various other objections (See "Exhibit 20," Petition for Prohibition).

It is contended by counsel for the Receivers that they are necessary parties to the appeal from the injunction issued on this order to show cause, on the

theory that the order to show cause and the following injunction was made at their instance. Nothing in the record supports this contention, and the proceedings in the lower court completely negative it. Prior to the making of the order to show cause there came on for hearing in the lower court the Petition of the Receivers concerning instructions. At that hearing the pendency of the New York suit was mentioned and concerning that suit the Court said:

“THE COURT—As I have indicated, I am very strongly of the view, from the reading of this contract, that the trustee is charged with the enforcement at least of these particular features of this contract; but the question which arises in my mind is whether or not that trustee having submitted the entire controversy to this court by asking its interposition in equity and for the appointment of a receiver has not subjected itself to the control of this court in directing when and perhaps in what form it shall proceed to enforce those rights; that is so that the administrative court may be able to see that it is being done under circumstances that will redound to the benefit rather than to the destruction of the property of the corporation.”

The following colloquy also took place between Mr. Olney, one of the Receivers, and the Court:

“MR. WARREN OLNEY, JR. — If your Honor please, before Mr. Partridge proceeds I would like, if I might, to say a few words here not by way of arguing any legal proposition but as directing myself to the question of policy which is involved here. Mr. Partridge’s views and my

own in regard to this matter of policy are not wholly in accord and I would like, if possible, to place my position in that respect before your Honor.

I have assumed all along that it was within the legal right of the trustee to maintain this suit; that is to say, the trustee either authorized by this court or otherwise could maintain the action. I have assumed also that it was probable that the Receivers themselves might maintain an action against the Denver & Rio Grande upon this guaranty. It simply became a question of policy as to whether or not the Receivers under those circumstances should themselves commence that suit.

"THE COURT—Well, of course, the Receivers would not and could not commence such a suit without the advice of the Court.

"MR. OLNEY—We have asked for instructions here not upon anything else but upon that very point, viz., as to whether or not the Receivers should be instructed to commence an action against the Denever & Rio Grande upon this guaranty. In that petition there is no recommendation as to what instructions should issue. Mr. Partridge has appeared here and apparently has urged that instructions issue that he commence the action—

"THE COURT—I do not understand Mr. Partridge to take that view. He simply asks upon the general instructions of the court. I do not understand you, Mr. Partridge, as urging that the court should direct the Receivers to commence this action

"MR. PARTRIDGE—On the contrary, if your Honor please, I specifically stated in the beginning that as representing the Receivers we were asking for instructions, not for any specific instructions.

"THE COURT—That was my understanding, Mr. Olney.

"MR. PARTRIDGE—I certainly had no in-

tention of in anyway representing to your Honor that the instruction they wanted was that one.

"MR. OLNEY—No, Mr. Partridge, and I did not intend to insinuate or to state that you stated that that was the instruction which the Receivers themselves wished. I said I thought that was your view of it.

"MR. PARTRIDGE—That is my personal view of it.

"MR. OLNEY—The view you have been urging upon the court here. That is as far as it went.

Now, so far as the dealings of the court with this trustee in New York is concerned, I have nothing whatever to say. If your Honor concludes that the trustee should have brought the suit here, or should be restrained from proceeding further with the suit there, that is nothing in itself and of itself concerns the Receivers and I have nothing to say about it. The point to which I wish to direct myself solely is the point I understood was up here in connection with the petition, and that is, as far as the petition itself certainly goes, the request for instructions as to whether or not the Receiver shall commence this action—

"THE COURT—I think you need not consume any time on that, Mr. Olney, because I certainly would not instruct the Receivers at this time to commence this action.

"MR. OLNEY—Then I have nothing further to say, your Honor.

"THE COURT—And I did not understand that that was the request here. The prayer of the petition I see is as to whether they should be instructed.

"MR. OLNEY—That is the only point upon which we have requested instructions, if your Honor please, just that one thing."

Towards the conclusion of the discussion the Court said:

" . . . In brief, my mind is firmly of this conviction: I cannot for a moment entertain the proposition that this court is so helpless in the administration of a great property of this kind under the bill that has been filed here so that it cannot control the action of any party connected with the suit, either directly or indirectly, with reference to litigation which involves the property or any of the subsidiary interests which are within the control of this court. I think that that power extends absolutely to the control and direction of the plaintiff in this cause, the Equitable Trust Company, as to not only the action which it has brought in New York but any other action which it might see fit to ask to bring."

And again the Court said, making the following order:

"I am entirely without hesitation to the extent that I have indicated, that this court has jurisdiction of the plaintiff in that suit, and in the suit pending here, that is, the Equitable Trust Company, and that it can so exercise that jurisdiction as to require it to show cause here upon a given day. That will enable it to fully place before this court the whole subject matter as to its rights in the premises.

"I will direct the attorney for the Receivers now to prepare an order along the general lines suggested here, and with proper recitals, directing the Equitable Trust Company, the trustee, to show cause here upon a given day why the action which has been brought in that district should not be dismissed or its further prosecution by the trustee

stayed until the further order of the court; and also that until that return day and a determination of the matter the trust company be restrained from taking any further step of any nature in that action. That will be the general nature of the order. I will sign such an order. And in order that responsibility may not be laid entirely upon Mr. How the order may be served upon Mr. How as the solicitor for the plaintiff in this district, but I would advise that the order be served immediately upon the Equitable Trust Company in New York."

On the hearing of the order to show cause the Court, speaking to Mr. Partridge, said:

"THE COURT—I do not understand your suggestion as to the diversity of view between the Receivers. There cannot be any desire or wish on the part of the Receivers as to how the litigation shall go."

We have taken the liberty of quoting the foregoing extracts from the proceedings of the lower court for the purpose of demonstrating that nothing has been omitted from the record in this case, and that there is no basis for any claim that the order to show cause and the subsequent restraining order were made at the instance of the Receivers.

The contention that the proceeding was a proceeding in contempt as distinguished from the proceeding for an injunction arises from confusion. There is nothing in the record to show or indicate that the order, which on its face purports to be an injunction, was anything but an injunction.

The following extracts from the proceedings in the lower court at the hearing of the order to show cause show the attitude assumed by the Court on this question:

"MR. BOWIE—It seems to me that the one question which this court is considering at the present time is, was the Equitable Trust Company in contempt when it filed this bill in New York?

"THE COURT—Oh, no, not whether it was in contempt, that is, I mean in any sinister way.

"MR. BOWIE—I mean in contempt so as to authorize that further proceedings be enjoined.

"THE COURT—Was it justified in bringing the proceeding?

"MR. BOWIE—In other words, was it bringing a proceeding which legally could not be brought without the sanction of this court?

"THE COURT—That is putting it in another way. Was it authorized in bringing that action and prosecuting it without the direction of this court; *if it was not authorized it can be restrained from prosecuting that action, it can be required to dismiss it.*"

In other words, the proceeding is to restrain a suit commenced without authority. This is the character of the proceeding as fixed by the lower court.

"MR. PARTRIDGE—Now, surely, if your Honor please, the question as to whether or not the Receiver was the proper party to bring the suit was before this court; in other words, even if it be conceded that the Receiver had no right to bring a suit under Contract B still the Receivers had submitted to this court the question as to whether or not they had a right to bring that suit

and certainly any action in another jurisdiction which sought to foreclose that question was an interference with a matter that was brought before the court by its receivers.

“THE COURT—It is merely the corollary of the proposition that before bringing that suit it was the duty of the trustee to submit the question to this court for its direction.”

The fact of the matter was that in this proceeding the Court was on its own motion asserting power to control the parties before it in collateral proceedings. The attitude of the Court being that expressed in the statement made on June 10th, the day before the order to show cause was written, when the Court declared:

“THE COURT— . . . In brief, my mind is firmly of this conviction: I cannot for a moment entertain the proposition that this court is so helpless in the administration of a great property of this kind under the bill that has been filed here as that it cannot *control the action of any party connected with the suit, either directly or indirectly, with reference to litigation which involves the property or any of the subsidiary interests which are within the control of this court.* I think that that power extends absolutely to the control and direction of the plaintiff in this cause, the Equitable Trust Company, as to not only the action which it has brought in New York but any other action which it might see fit to bring.”

This proceeding was not a proceeding for contempt, though certain of the arguments advanced in favor of the jurisdiction of the Court to enjoin the

prosecution of the New York bill, viz., the argument that the subject-matter with which that bill dealt was in the possession of the Receivers would, had the same been asserted and upheld, have formed the basis of a contempt proceeding. The Court, however, did not see fit to bring a proceeding to punish for a contempt committed, but intend to assume direction and control over the future action of the Trustee, through injunctive process. Thus: the injunction itself, issued on the order to show cause, not only restrains the prosecution of the New York Bill, *but restrains the Trustee from doing any act which may in anywise affect or impair the obligations of Contract B or any of its provisions without first procuring the sanction of the Court.* IN OTHER WORDS, THE TRUSTEE IS RESTRAINED NOT ONLY FROM SUING IN NEW YORK, BUT ALSO FROM TERMINATING ALL PROVISIONS OF CONTRACT B, SAVE AND EXCEPTING THE PROVISIONS OF SURETYSHIP, THOUGH THE TRUSTEE IS BY THE TERMS OF HIS TRUST REQUIRED TO TERMINATE THESE PROVISIONS SHOULD TWO-THIRDS OF THE BONDHOLDERS ELECT SO TO DO AND NOTIFY IT OF THEIR ELECTION.

The claim that the order in question is an order punishing for contempt assumes that the injunction embodied in the order appointing the Receivers was sufficiently broad, either by express terms or by necessary implication, to prohibit the commencement of the suit in New York. Admittedly this is not the

fact, unless the suit in New York interfered with the property in the possession of the Receiver. If petitioners be correct—and no substantial argument is advanced to the contrary—the commencement of the suit in New York did not constitute an interference with the possession of the Receivers, and although the lower court was of a different opinion, it did not propose to rest its order on any such basis. *The lower court claimed the right to control the future conduct of the Trustee as well as the right to protect property in the possession of the Receiver. Accordingly, instead of making an order in the nature of a contempt order, it ignored the past, did not direct the Trustee to dismiss the bill, and made an order enjoining the Trustee from further prosecuting the suit in New York or taking any steps whatever under Contract B without the consent of the Court.* This order, if violated, would form the basis of a proceeding in contempt. It is admittedly broader in scope than the injunction contained in the order appointing Receivers and is, therefore, itself an injunction, not a contempt proceeding. Injunction is the proper and appropriate remedy by which to control the future conduct of a party and protect the jurisdiction of the Court from interference through the initiation of suits in other jurisdictions (See *Guardian Trust Co. v. Kansas*, 146 Fed., 340). Such injunctions are usually sought through the filing of a dependent bill, but here the Court, acting on its own

motion, bases the order on its order to show cause why such injunction should not issue.

COMMENTS ON CERTAIN AUTHORITIES CITED BY
RESPONDENT.

The case of *Lowe v. Blackburn* (87 Fed., 392), is cited as authority for the proposition that the Court in foreclosing the mortgage is at liberty to disregard the provisions of the mortgage and to conduct the foreclosure proceeding as it may see fit. This case does not lay down any such principle of law. It merely holds that the provisions of a mortgage governing the manner in which a sale of the mortgaged property shall be made by the trustee, are not binding upon the Court when a judicial sale takes place. It is, of course, true that the parties cannot by contract deprive the Court of the powers ordinarily incident to it in judicial proceedings, nor can they prescribe the mode in which a Court shall conduct a judicial sale.

The contention that when a court has taken possession of property by receiver it thereupon becomes enabled to require any controversy it may desire to be submitted to it, is utterly without support or authority. On the contrary, the settled rules of law apply to proceedings in which receivers are appointed as well as all other proceedings, the only exception being that claims to property in the possession of the receivers or to the possession of which the re-

ceivers are entitled must be litigated before the tribunal appointing the receivers. This, however, does not mean that the Court can require the parties to the action in which the receivers are appointed to litigate questions which they do not desire to litigate, and which do not involve title or right of possession to the property in the hands of the receivers.

The case of *Newton v. Gage* (155 Fed., 598), expressly recognizes this settled rule of law.

The case of *Mercantile Trust Company v. Atlantic and Pacific* (70 Fed., 518), merely declares that when property is in the possession of the receiver of the court the Court will not authorize action to foreclose a prior mortgage to be brought in another jurisdiction, but to require that such action be brought by cross-bill. The rule is, of course, eminently proper.

In closing, we desire to call the attention of the Court to the decisions of the Supreme Court of Michigan, a State in which a mortgagee is by statute given the express right to join the guarantor in an action of foreclosure. In *Vaughan v. Black and others*, the Supreme Court of Michigan said:

“ . . . It has been settled by repeated decisions of this court that it is not within the power of courts of chancery to grant absolute personal decrees against parties claimed to be collaterally liable for the mortgage debt in the original decree, and, if done, the decree is so far nugatory. The remedy is purely statutory, and

cannot be invoked until after a balance is reported unsatisfied"

Vaughan v. Black et al., 29 N. W. Rep., 523-4.

See also:

Windsor v. Ludington, 43 N. W. Rep., 867.

Respectfully submitted.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE EQUITABLE TRUST COMPANY OF NEW
YORK,

Plaintiff,

vs

WESTERN PACIFIC RAILWAY COMPANY,

Defendant.

Appeal.

In the Matter of the Petition of the Equitable Trust Company of New York, as Trustee, for a Writ of Mandamus to be issued and directed to Honorable William C. Van Fleet, Judge of the District Court of the United States for the Northern District of California, and to said District Court.

Petition for
Mandate.

Ex Parte The Equitable Trust Company of New York, as Trustee of the First Mortgage of the Western Pacific Railway Company, Plaintiff in the Action of the Equitable Trust Company of New York, as Trustee, against Western Pacific Railway Company.

Petition for
Prohibition.

Memorandum of Points and Authorities to Show That Apart From Any Consideration on the Merits, 1. The Appeal Herein Should Be Dismissed; 2. The Application for a Writ of Mandamus Should Be Denied; and 3. The Application for a Writ of Prohibition Should Be Denied.

GARRET W. MCENERNEY,
JOHN S. PARTRIDGE,
Attorneys for Receivers and Respondent.

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I.

The Court Is Not Bound to Follow the Provisions of the Mortgage.

This is distinctly set forth in the very well considered case of *Low v. Blackford*, 87 Federal, 392, by the Circuit Court of Appeals for the Fourth Circuit. After citing a number of authorities, the Court say:

"The authorities cited sustain the conclusion that the parties to a contract cannot, by its terms, deprive a court of equity of its right, in the due course of its proceedings, to adopt such plans concerning the sale of property as the peculiar circumstances of the case before it shall suggest to be proper for the protection of the interests of all the parties."

II.

The Appeal From the Order Enjoining the Further Prosecution of the Ancillary and Dependent Bill Should Be Dismissed for the Following Reasons:

A. The order appealed from is not appealable. Said order though nominally an injunction is in effect nothing more than an order demanding that the appellant refrain from further interference with the possession of the receivers.

1. An order appointing a receiver by necessary implication enjoins all interference with the possession of the receiver.

"The appointment of a person receiver of property is, in effect, the issuance of a *quasi* injunction in respect to the same. High on Re-

ceivers, Secs. 163, 164, 165; *Gravenstine's Appeal*, 49 Penn. St. 310, 321."

Gilbert v. Block (1893), 51 Ill. App. 516, 523, 524.

"Judge *Baldwin*, in *Beverley v. Brooke and others*, 4 Gratt. 187, 212, held that the appointment of a receiver is in the nature of an injunction. Kerr on Receivers says (page 12): 'It operates as an injunction. An order for an injunction is always more or less included in an order for a receiver. It is not necessary if a receiver be appointed, to go on and grant an injunction in terms.'"

Smith v. Butcher (1877), 28 Grattan (Va.) 144, 151.

"The appointment of a receiver was a suspension of its functions and authority over its property and effects, and was equivalent to an injunction to restrain its agents and officers from intermeddling with its own property in any way. Surely this could not be done without making it a party."

Gravenstine's Appeal (1865), 49 Pa. St. 310, 321.

"The order for the receiver is itself an injunction."

Schlecht's Appeal (1869), 60 Pa. St. 172, 176.

2. An order made in a receivership proceeding enjoining interference with the possession of the receiver is not referable to the power to issue injunctions but rather to the inherent power of the court to protect possession of its receiver and is, therefore, not properly an injunction even though so called.

Woerishoffer v. North River Const. Co. (1885), 99 N. Y. 398; 2 N. E. 47;

Levy v. Stanion (1898), 53 N. Y. Supp. 473;
 33 App. Div. 632;
Central Trust Co. v. Worcester Co. (Cir. Ct.
 D. Conn.), 114 Fed. 659, 665 (1902);

See, also,

*Highland Ave. etc. R. Co. v. Columbian
 Equipment Co.*, 168 U. S. 627; 42 L. Ed.
 605.

B. If said order is properly an injunctive order it is merely confirmatory of the order made at the request of the appellant when the receivers were appointed. The latter order is not reviewable by the appellant for the two-fold reason (1) that it was made at its request and (2) that the time to appeal therefrom has expired. The fact that by its order of February 21, 1916, the court reaffirmed its original order enjoining interference with the possession of the receivers gives the appellant no right of appeal.

1. The original order enjoining interference with the possession of the receivers was made at the time of the appointment of the receivers, March 2, 1915. The time to appeal from this order expired thirty days thereafter, to-wit, April 1, 1915. No appeal having been taken therefrom the original order has long since become final.

2. The only theory upon which it could be claimed that the order of February 21, 1916, reaffirming the original order of March 2, 1915, was appealable, was that the latter order "continued in force the former order"; but a second order reaffirming the provisions of a first order can be said to "con-

tinue in force" the first order only where the first order has expired by limitation.

"It is not at all difficult to satisfy the meaning of the expression 'order continuing an injunction'. It generally happens that a preliminary injunction expires at the entry of a decree on the merits. Such a decree may grant a perpetual injunction and yet because of an order referring questions of damages to a master still be only interlocutory in its character and not reviewable as a final appeal until the coming in of the master's report and its confirmation by the court. . . . Such a decree would be an interlocutory decree continuing an injunction. So, too, a court may for good reasons grant an injunction until the next term of the court. An order giving the injunction force thereafter would be an order continuing an injunction because without such order the injunction would stand dissolved by lapse of the time fixed in the original order."

Kreutzer v. Frankfort Land Co. (Circuit Court of Appeals, 6th Circuit), 65 Fed. 642, 645, per Taft, J.

C. The order appealed from having been made upon the initiative of the receivers upon the ground that the maintenance of the ancillary and dependent bill was an interference with the possession of the receivers, the receivers are NECESSARY parties to an appeal from that order. They have not been made parties to the appeal and, therefore, it must be dismissed.

Illinois Trust & Savings Bank v. Kilbourne, et al. (1896), 76 Fed. 883.

"Where a decree gives priority to a certain claim against an insolvent corporation, the re-

ceiver thereof, and all creditors whose claims are subordinated, and who were parties to the suit, are necessary parties to an appeal, and their absence is fatal to it." (Syllabus.)

In the opinion (p. 888), it is said:

"The receiver was clearly entitled to be heard upon the question as to whether there should be any change in the decree. So, also, were the holder of the second mortgage upon the property, and the unsecured creditors, whose claims were, by the decree appealed from, subordinated to the Sears judgment to the extent of \$16,036. But that amount was not the limit of the claim of the intervening petitioners, and the setting aside of the decree appealed from might result in a larger allowance to those petitioners, and a corresponding decrease in what the holder of the second mortgage and the unsecured creditors may receive. Manifestly, therefore, those parties to the record were necessary parties to the appeal, and their absence is fatal to it. *Davis v. Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693; *Sipperley v. Smith*, 155 U. S. 86, 15 Sup. Ct. 15. Appeal dismissed."

Polk v. Johnson (1906), 167 Ind. 548, 78 N. E. 652.

"Where, after the resignation of a receiver, a judgment was rendered directing the receiver's successor to pay him a specified sum for his services, from which judgment a vacation appeal was taken by the debtor, the succeeding receiver was a necessary party to such appeal, under a statute requiring all persons named in and affected by the judgment from which a vacation appeal is taken to be made parties." (Syllabus.)

In the opinion (p. 653) it is said:

"The judgment from which this appeal was taken was rendered against the Central Trust Company, as receiver. The receiver represents the interests of creditors, as well as those of the embarrassed debtor, and *an orderly administration of his trust requires such receiver to be a party to every proceeding affecting the estate in his custody.* The right of appeal is wholly statutory, and our statutes authorizing appeals require all persons named in and affected by a judgment from which a vacation appeal is taken to be made parties. The Central Trust Company, as receiver, was a necessary party to this appeal, and failure to join it is ground of dismissal. *Moore v. Ferguson*, 163 Ind. 395, 72 N. E. 126; *Crist v. Wayne Assn.*, 151 Ind. 245, 51 N. E. 368; *Stults v. Gibler*, 146 Ind. 501, 45 N. E. 340; *Roach v. Baker*, 145 Ind. 330, 43 N. E. 932, 44 N. E. 303; *Shuman v. Collis*, 144 Ind. 333, 43 N. E. 257; *Lee v. Mozingo*, 143 Ind. 667, 41 N. E. 454, and cases cited."

This case is affirmed in 79 N. E. 491.

Twitchell v. Weil (1897), 6 Kan. App. 53; 49 Pac. 634.

"A receiver appointed to take charge of the property of an insolvent debtor, who was a necessary party herein, since the institution of these proceedings in error, must be made a party in this court, or there is a defect of parties." (Syllabus.)

In the opinion (p. 635) it is said:

"Under the authority of *Scannell v. Felton*, 57 Kan. 468, 46 Pac. 948, these receivers are necessary parties in this court, and, in their absence, the petition in error must be dismissed."

Rache v. Stanley (1897), 15 Utah 314; 49 Pac. 648.

"Plaintiff obtained a judgment by default on foreclosure of a mortgage on realty against S. as receiver of a partnership and T. as administratrix. The money for which the mortgage had been given was received and used by the partnership, and the land mortgaged was partnership land. The administratrix was the wife of one of the partners, and a deficiency judgment was entered against her. Upon appeal the administratrix failed to serve notice on S., the receiver. Held, that S. was an adverse party under section 3636, Comp. Laws 1888, and that the failure to serve him with notice was fatal to the appeal." (Syllabus.)

In the opinion (p. 649) it is said:

"The receiver of the partnership of Thompson Bros. was clearly an adverse party, and the failure to serve him with notice is fatal to the appeal. The same question was presented and discussed with some care in the case of *Commercial Nat. Bank v. United States Savings, Loan & Building Co.* (Utah), 44 Pac. 1043, and on the authority of that case the appeal herein is dismissed."

Mosler v. State Bank of Perry (1897), 6 Kan. App. 172; 51 Pac. 309.

"A receiver of an insolvent bank, duly appointed under the banking laws to take charge of its assets, is a necessary party to a proceeding in error in this court to reverse a judgment rendered in favor of the bank against an interpleader who sought to receive certain property in the hands of said receiver, and claimed as a part of the assets of said bank." (Syllabus.)

In the opinion it is said (p. 310):

"From the case made, as well as from the brief of the plaintiffs in error, it appears that

the receiver of the bank was the real party in interest adverse to the plaintiffs in error, and as such, under the authority of *Scannell v. Felton*, 57 Kan. 470, 46 Pac. 948, was a necessary party to a review of the judgment herein. See, also, *Talmage v. Pell*, 9 Paige, Ch. 410; also, *Twit-chell v. Weil* (recently decided by this court), 49 Pac. 634. These proceedings in error will be dismissed."

Pacific Coast Trading Co. v. Bellingham Bay Baseball Ass'n (1897), 18 Wash. 245; 51 Pac. 382.

"The receiver of an insolvent corporation, appointed on petition of certain judgment creditors of such corporation, was a proper party to plaintiff's appeal from a judgment finding that plaintiff's claim against the common debtor was barred by limitations, and ordering the receiver to distribute the fund among such judgment creditors, and was entitled to notice of such appeal." (Syllabus.)

In the opinion it is said (p. 382):

"The receiver was a proper party, and entitled to be served with notice. It follows that the motion must be granted, and the appeal dismissed."

III.

The Petition for Writ of Mandamus Should Be Denied for the Following Reasons:

A. The circuit court of appeals has no original jurisdiction. Its jurisdiction is entirely appellate and it has no power to issue writs of mandamus except as ancillary or auxiliary to its appellate jurisdiction.

"The test of appellate jurisdiction in the exercise and aid of which the courts of appeals may

issue writs of mandamus is the existence of that jurisdiction, not its prior invocation. *It is the existence of a right to review by a challenge of the final decisions or otherwise in the cases or proceedings to which the application for the writs relate.*

Barber Asphalt Pav. Co. v. Morris, (Circuit Ct. of Apps. 8th Circuit), 132 Fed. 945.

"We think it is the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."

McClellan v. Carland, 217 U. S. 268; 54 L. Ed. 762, 766.

"Under federal practice the writ may be employed in aid of appellate jurisdiction and the Circuit Court of Appeals is authorized to invoke its assistance in appropriate cases. The writ so employed extends to jurisdiction which might otherwise be defeated by the unauthorized action of the lower court."

In re Dennett (Circuit Ct. of Apps. 9th Cir.), 215 Fed. 673, 677.

"The right in this court to issue writs of mandamus is incidental to other powers expressly conferred; and it need not be said that since the power to review simply a question of jurisdiction in the court below does not reside in this court, there is nothing to which the right to issue such a writ can be said to be an incident."

United States v. Sessions (Circuit Ct. of Apps. 6th Cir.), 205 Fed. 502.

1. It is only when the jurisdiction which might be exercised by the Circuit Court of Appeals to re-

view an *appealable judgment or order* is defeated or impaired by an interlocutory order of the District Court that the Circuit Court of Appeals *can* issue a writ of mandamus to control the action of the District Court.

Barber Asphalt Pav. Co. v. Morris, supra;
McClellan v. Carland, supra.

"The writ so employed extends to jurisdiction *which might otherwise be defeated* by the unauthorized action of the lower court."

In re Dennett, supra.

See, again,

United States v. Sessions, supra.

2. Neither the order of the District Court continuing proceedings before it for one week nor that directing that new parties be brought in tends to defeat or in anywise hinder or impair the appellate jurisdiction of this court to review any appealable order or judgment which may be hereafter rendered in the action.

The complainant's right to proceed to decree has not been affected in anywise by either of the orders complained of nor has either of those orders in anywise affected the power of this court to review the decree which shall be finally entered in the action.

B. The cases relied upon by the appellant to sustain its petition for mandate are inapplicable.

This proposition will be considered separately later. Suffice it here to say that the cases relied upon

by the appellant in this connection were all of them cases where the order of the lower court effectually prevented the plaintiff in the action from procuring a judgment *on the merits* in the action.

C. Mandamus cannot be used to perform the office of an appeal or writ of error. This rule applies even in cases where no appeal or writ of error is allowed by law.

"The accustomed office of a writ of mandamus when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision either interlocutory or final made in the exercise of a lawful jurisdiction especially where in regular course the decision may be reviewed upon a writ of error or appeal."

Ex parte Rowe, 234 U. S. 70; 58 L. Ed. 1217.

"The refusal of a federal circuit court to remand a civil cause to the state court whence it had been removed as presenting a separable controversy between citizens of different states, cannot be reviewed by mandamus *which may not be used to perform the office of an appeal or writ of error.*"

Ex parte Harding, 219 U. S. 363; 55 L. Ed. 252. (Syllabus.)

"The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of ultimate jurisdiction. *The writ cannot be used to perform the office of an appeal or writ of error even if no appeal or writ of error is given by law.*"

In re Rice, 155 U. S. 396; 39 L. Ed. 198, at 201.

i. The order of the Circuit Court directing new parties to be brought in was one made in the exercise of its jurisdiction. If proper or valid the cause was not ready for trial, and since neither the propriety nor the validity of the order may be considered on mandamus the petition for that writ must be denied. This question may be more appropriately considered under prohibition, and we there consider it.

See, however, *in re Pollitz*, 206 U. S. 323; 51 L. Ed. 1081, wherein the Supreme Court denied a petition for a writ of mandate to compel a circuit court to remand to the state court a cause which the circuit court had refused to remand because of its opinion that the case presented a controversy between the removing defendant and the plaintiff which could be fully determined between them without the presence of the other defendants. The case cited presents the converse of the case at bar for in it the court refused to mandamus the Circuit Court to remand a case of which the Circuit Court properly took jurisdiction if it were correct in its conclusion that *certain parties were not necessary*. In the present proceedings the trial court has concluded that the *presence of certain parties is necessary*. This is a judicial determination which the District Court had the power to make and its order cannot be reviewed by mandamus.

D. Mandamus is an extraordinary remedy granted only in extraordinary cases and dependent also on the exercise of a wise judicial discretion. For this reason alone it should be denied in the present case.

"Mandamus, although it has become now a civil suit, is of a prerogative nature, and is strictly an extraordinary remedy granted only in extraordinary cases and dependent also upon the exercise of a wise judicial discretion."

In re Welch Mfg. Co. (Circuit Ct. of Apps. 1st Circuit), 201 Fed. 519, 520.

1. If this court should establish a precedent of reviewing on petitions for mandamus orders of the character here sought to be reviewed, that extraordinary remedy would be used as the equivalent of an appeal and the time of this court would be taken up in disposing of applications for such writs to control the discretion of the district court.

IV.

The Petition for a Writ of Prohibition Should Be Denied for the Following Reasons:

A. The Circuit Court of Appeals has no ORIGINAL jurisdiction. Its jurisdiction is entirely appellate and it has no power to issue writs of prohibition except as ancillary or auxiliary to its appellate jurisdiction.

In *Zell v. Judges of the Circuit Court* (Circuit Ct. of Appeals, 4th Circuit), 149 Fed. 86, the syllabus reads as follows:

"A circuit court of appeals has no power to issue a writ of prohibition as an original or independent proceeding, but only in aid of its own jurisdiction which is wholly appellate, and except in cases of petitions for review in bankruptcy proceedings, can only be revoked by an appeal or writ of error. Nor can it issue such

writ as ancillary to a contemplated appeal or writ of error."

In the opinion it is said (p. 91):

"We are of the opinion that every case of which this court can take jurisdiction, except petitions relating to bankruptcy proceedings, must be brought to it by either appeal or writ of error. It has no power to issue the writ of prohibition as an original or independent proceeding, and it has no right to issue it as ancillary to a contemplated writ of error or appeal, though it is quite apparent that cases may present themselves, after a writ of error or appeal has been perfected, in which it would not only be proper but absolutely necessary that such writ should issue in aid of its jurisdiction."

A petition for a writ of *certiorari* to review the judgment of the Circuit Court of Appeals was denied by the Supreme Court.

See 204 U. S. 669; 51 L. Ed. 672.

See, also, *In re Paquet* (Circuit Ct. of Apps. 5th Circuit), 114 Fed. 437.

1. It is only where the appellate jurisdiction of the Circuit Court of Appeals has been interfered with by the action of the District Court that prohibition will lie.

This follows necessarily from the fact that the power of the Circuit Court of Appeals to issue writs of prohibition is only incidental to its appellate jurisdiction.

2. The order of the District Court directing that

new parties be brought in in no wise interfered with the appellate jurisdiction of this court.

(a) At the time the application for writ of prohibition was made to the Circuit Court of Appeals, the appellate jurisdiction of that court had not been invoked; therefore, this court has no power to issue a writ of prohibition since there was no existing appellate jurisdiction to which the writ of prohibition could attach as an incident.

In re Paquet, supra;
Zell v. The Judges, supra.

(b) The rule which now applies in mandamus proceedings that it is not necessary before the issuance of the writ that the jurisdiction of the Circuit Court of Appeals *shall have been actually invoked* if the action of the District Court is such as tends to defeat or impair an appellate jurisdiction which may be thereafter invoked, does not apply in prohibition.

Mandamus reviews *inaction*; prohibition reviews *action*. The refusal of a district court to proceed in a case so that a party might have a judgment on the merits would, if persisted in, prevent the party from ever invoking the appellate jurisdiction of the circuit court of appeals and may, therefore, be said to be an interference with the appellate jurisdiction of that court. The order of a district court, however, ordering new parties to be brought in to the action, does not affect the right of the complainant to proceed to a decree upon the merits nor the right of this court to review the decree when rendered. Unless, therefore, there is a pending appeal to preserve the jurisdiction of which a writ of prohibition is necessary, such writ should be denied

B. The case relied upon by the petitioner is inapplicable. This point we will specifically deal with

later. We here note the fact, however, that in *United States v. Mayer*, 235 U. S. 55; 59 L. Ed. 129, a writ of error was pending in the Circuit Court of Appeals at the time the District Court made an order vacating a judgment from which the appeal had been taken and which, of course, if not set aside would have deprived the Circuit Court of Appeals of jurisdiction of the appeal for the reason that the appeal from the judgment would fall with the vacating of the judgment.

C. No orders can be reviewed upon prohibition except such as are in excess of jurisdiction. An order even though erroneous if made in the exercise of jurisdiction is not reviewable on prohibition.

Ex parte Gordon, 104 U. S. 504; 26 L. Ed. 814;

Matter of the State of Pennsylvania, 109 U. S. 174; 27 L. Ed. 894;

Smith v. Whitney, 116 U. S. 167; 29 L. Ed. 601;

Matter of Fassett, 142 U. S. 479; 35 L. Ed. 1087, 1090;

Alexander v. Crollott, 199 U. S. 580; 50 L. Ed. 317.

In *Pope Mfg. Co. v. Arnold Schwinn & Co.*, 208 Fed. 406, the syllabus reads as follows:

"An alleged error in the taxation of costs in a suit in which the court had jurisdiction of the subject-matter and the parties cannot be reviewed by a petition for a writ of prohibition, *which is a collateral attack and can prevail only where the court was without jurisdiction to render the judgment or make the order complained of.*"

1. Under equity rule 37 the court had *power* to order in *necessary parties*.

Equity rule 37 provides in part that "any person may at any time be made a party if his presence is *necessary* or *proper* to a complete determination of the cause."

We shall hereafter point out that this rule promulgated November 4, 1912, marks a new departure in equity pleading and effectually distinguishes the cases relied upon by the petitioner.

2. The court having possession, through its receivers, of the property of the Western Pacific Railway Company, had the *power* to order all persons brought in whose presence was necessary to a complete determination of the possession, control and disposition of that property.

Krippendorf v. Hyde, 110 U. S. 276; 28 L. Ed. 145.

In *Morgan's La. & Texas R. R. & Steamship Co. v. Texas Central Ry. Co.*, 137 U. S. 95; 34 L. Ed. 625, it is said (p. 636):

"The property was in the actual possession of that court (Circuit Court) and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control."

See, also, *Gumpel v. Pitkin*, 124 U. S. 131; 31 L. Ed. 374;

Milwaukee & Minn. R. R. Co. v. Soutter, 69 U. S. 609; 17 L. Ed. 886, 895.

See, particularly, *Compton v. Jessup*, 68 Fed. 263, wherein in reply to an argument that although in a

case where a court had possession of property through its receivers it had power to *permit* a person to intervene for the protection of its rights, it had no power to *compel* such person to come in, the court speaking through Taft, J., said:

"The argument is that the right of the federal court to grant relief to persons claiming an interest in property in its custody, without regard to their citizenship, is founded on its duty to prevent an abuse of its process to the prejudice of strangers to the suit, and is dependent on the wish of such strangers to secure that relief, expressed in an affirmative and voluntary appeal for the aid of the court, and that no power exists in the court to compel such a stranger to come into court, against his will, simply because he claims an interest in the property impounded, if his citizenship would prevent the issue of such process against him in the original suit. Let it be conceded, for the purpose of the argument, that the distinction made is a sound one. It does not help Compton. He was not brought into court to prevent prejudice to him by the federal court's possession of the *res*. He was brought into court to prevent prejudice to Knox and Jesup, who, otherwise having no right to invoke the action of the federal court, did so on the ground that its possession of the *res* prevented their getting full and adequate relief in the state tribunals, and who were therefore entitled to bring into the case every one whose presence as a party was necessary to give them such relief. They had the right to have the railroad sold free from all liens, so that the purchaser should have an unclouded title, and this could not be done without Compton's presence."

Mercantile Trust Co. v. Atlantic & Pac. R. R. Co., 70 Fed. 518, was a proceeding similar to the

case at bar. Ross, J., sitting as circuit judge, denied an application for leave to bring an independent suit by a second mortgagee *upon the ground that the property being in the possession of the court through its receivers*, the court had the right to bring in all persons interested in the property.

Speaking of persons made defendants in the proposed independent bill and who were not parties to the original bill, Judge Ross says:

"The Court itself may and always would order them brought in if they should at any time pending the suit appear to be necessary parties to its proper determination."

See, also, *Newton v. Gage*, 155 Fed. 598, wherein the decision of Judge Ross is approved at page 607.

(a) The ordinary rules of equity pleading with reference to parties do not apply in a case where the court has taken possession of property through its receivers. In such a case the court has power *by mandatory injunction to compel* third persons to come in and litigate their claims with respect to the property in the possession of the court.

See, *People's Bank v. Winslow*, 102 U. S. 256; 26 L. Ed. 101.

The facts in this case were these:

Calhoun and Updyke filed in the Circuit Court a suit to foreclose a railroad mortgage and also asked for the appointment of a receiver to take possession of the road. The latter order was granted. While the suit was pending in the Circuit Court, the People's Bank (plaintiff in error) brought a suit against Winslow and at-

tached a portion of the property already in the possession of the receivers. Thereupon the complainant in the foreclosure suit applied to the Circuit Court to enjoin the People's Bank from the further prosecution of its attachment suit. No disposition seems to have been made at this attachment for the reason that the parties to the application suit stipulated that it might be removed to the Circuit Court.

Speaking of the stipulation for removal to the federal court, Mr. Justice Miller says:

"The plaintiff was attempting in the state court to enforce a lien on the railroad by judicial sale which was a rival and conflicting lien to that of Calhoun and Updyke who were proceeding in the federal court to sell the same property under their lien. The latter court had not only obtained jurisdiction of the question of lien prior to the initiation of plaintiff's suit, but it had taken possession of the property by its receiver. It had thus drawn to itself the subject matter of the litigation and the right to decide upon the conflicting claims to the possession and control of the road. . . . In consenting, therefore, to the voluntary transfer of the litigation from the state court into the federal court *the parties did no more than what they could have been compelled to do by the injunction of the latter, and what would have been done by such compulsory order if they had not submitted to it by agreement.*"

See, also, *Mercantile Trust Co. v. Atlantic & Pac. R. R. Co.*, *supra*, and *Newton v. Gage*, 155 Fed. 598, 607, to the point that the ordinary rules of equity pleading are inapplicable *where the court has possession of the property affected by the suit.*

(b) The court having the power to order strangers to the litigation to be brought in to

litigate their rights with respect to *the property in the possession of the court*, had the incidental power to determine what constituted the property in the possession of the receivers. If it concluded that Contract B and the rights thereunder were property in the possession of the receivers its conclusion though erroneous could not be void and its order directing strangers to the litigation to be made parties to litigate their rights with respect to Contract B though it likewise might be *erroneous* could not be *void*.

This proposition is self-evident.

D. No case will be found where prohibition has been used for the purpose here sought.

1. We later deal with the case of *United States v. Mayer*, 235 U. S. 55, relied upon by the petitioner, and show it to be inapplicable. We merely here note in passing that in that case the Circuit Court of Appeals in which there was already pending an appeal from a judgment was held authorized *to protect its appellate jurisdiction* by preventing the lower court from making an order in excess of the latter's jurisdiction which would have destroyed the jurisdiction of the Circuit Court of Appeals.

E. Prohibition is an extraordinary writ and grantable of right only in cases where the court has CLEARLY no jurisdiction of the cause originally and no other remedy exists in favor of the petitioner. In all other cases the writ is grantable only as a matter of judicial discretion. The case here presented clearly is of the latter character and the petition for the writ should be denied.

See *In re Rice*, 155 U. S. 396; 39 L. Ed. 198, 201, wherein a petition for a writ of prohibition was denied as was likewise a petition for a writ of mandamus.

V.

The Argument of the Petitioner and Appellant Proceeds Upon Erroneous Principles and Is Attempted to Be Supported by Authorities Which Do Not Support It.

A. The argument that the District Court has no power of its own motion to order new parties brought in or to COMPEL a party before the court to bring in a stranger to the litigation proceeds upon principles of GENERAL EQUITY PLEADING inapplicable in the present case.

1. The rule that if necessary parties are not before the court, the court has no power to order them brought in but is limited to a dismissal of the bill if they are not brought in, has never been applied in a case where the court through receivers or otherwise *has possession* of the property affected by the pending litigation.

See, again,

Peope's Bank v. Winslow, 102 U. S. 256; 26 L. Ed. 101;

Mercantile Trust Co. v. Atlantic & Pac. R. Co., 70 Fed. 518;

Newton v. Gage, 155 Fed. 598,

and other cases cited *supra*.

2. Independent of other circumstances, the rules of equity pleading relied upon by the petitioner and

appellant were changed by equity rule 37 adopted November 4, 1912, which in terms provides that—

“Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause.”

B. The cases of Searles v. Jacksonville etc. Co., 2 Woods, 621 (Federal Cases No. 12,586), and Shields v. Barrow, 7 How. 130; 15 L. Ed. 158, cited by the petitioner to the proposition that the court has no power to order strangers to a litigation to be brought in, are inapplicable for the reasons (a) that they were decided before the adoption of equity rule 37 which in terms grants such power to the court; and (b) that they involve the general rules of equity pleading which, as above shown, are inapplicable in a case WHERE THE COURT THROUGH ITS RECEIVERS HAS POSSESSION OF THE PROPERTY IN CONTROVERSY.

C. The cases relied upon by the petitioner on its argument in support of its petition for mandamus are not in point.

1. The case of *McClellan v. Carland*, 217 U. S. 268, 54 L. Ed. 762, relied upon by the petitioner, was a case where the Circuit Court had continued the trial of an action pending before it until such time as the trial of another action pending in the state court should be concluded. The Supreme Court in holding that the Circuit Court of Appeals had power to grant a writ of mandate to compel the Circuit Court to proceed to trial did so upon the

ground that a litigant in the federal court had a right to the independent judgment of the federal court and that a continuance of a trial of an action pending in the federal court until such time as an action pending in the state court had been tried, would deprive a litigant of such right for the reason that the judgment in the state court would be *res judicata* on the parties in the controversy and thereby prevent a trial in the federal court on the merits. The court further held that inasmuch as the Court of Appeals would have the right to review a final judgment that might be rendered in an action in the Circuit Court of which right of review it would be deprived by the action of the Circuit Court, it had jurisdiction to issue a writ of mandate to compel the Circuit Court to proceed with the trial. The basis of the decision, therefore, was that the action of the Circuit Court would prevent a trial upon the merits and therefore prevent the Circuit Court of Appeals from exercising its appellate jurisdiction.

2. The case of *In re Rice*, 155 U. S. 396; 39 L. Ed. 198, does not support the position of the petitioner. In that case a petition for mandate was denied upon the ground that the Circuit Court had already proceeded to judgment in the premises and the judgment and proceedings of the court were in the exercise of its jurisdiction and therefore could not be controlled by mandamus.

D. The case of *United States v. Mayer*, 235 U. S. 55; 59 L. Ed. 129, relied upon by the petitioner in

support of its application for prohibition is not in point.

In this case one Freeman was on March 14, 1913, convicted of violation of the statutes relating to the use of mails. On the same day a judgment of conviction was entered and sentence was imposed. On March 24, Freeman sued out a writ of error to the Circuit Court of Appeals to review the judgment of conviction. Assignments of error were filed, and on May 13, 1913, Freeman was admitted to bail by the District Court. After the expiration of the term at which the judgment was entered, Freeman moved the court for an order setting aside the judgment, quashing the indictment and in the alternative for a new trial. The District Court having raised the question of its lack of jurisdiction to make the orders because of the expiration of the term at which the judgment was rendered, the attorney for the United States tendered his consent that the application be heard upon the merits. Thereupon argument was had and an order made granting Freeman a new trial on the ground that he had not had an impartial trial for the reason that one of the jurors had entertained a bias against him. Thereafter, on April 6, 1914, the United States Attorney procured an order in the Circuit Court of Appeals directing the district judge to show cause why a writ of prohibition should not be issued forbidding the entry of an order vacating the judgment of conviction and granting a new trial upon the ground that the District Court was without jurisdiction to enter it for the reason above stated, that the

term at which the judgment was entered had expired before any attempt was made to review the judgment. The Supreme Court of the United States on questions certified to it by the Circuit Court of Appeals held (a) that the District Court had no jurisdiction to enter the order vacating the judgment for the reason that that court lost jurisdiction of the judgment with the expiration of the term at which it was entered; and (b) that inasmuch as a writ of error was pending in the Circuit Court of Appeals from the judgment at the time that the District Court attempted to set aside the judgment, the Circuit Court of Appeals to protect its appellate jurisdiction had power to issue a writ of prohibition to prevent the entry of the order vacating the judgment. The decision, therefore, holds that in a case where the jurisdiction of the Circuit Court of Appeals has *already been invoked* that court will by prohibition restrain the District Court from making any order which would interfere with the appellate jurisdiction of the Circuit Court of Appeals which has already attached. This is the extent of the decision.

E. Even prior to the adoption of present Equity Rule 37 and in a case where the property involved in a suit was not in the possession of the court through its receivers so that the court could not compel the complainant to sue parties whom he did not wish to sue, an order made by the court directing the complainant to bring in new parties would not be in excess of the court's jurisdiction. Such an order would be

erroneous but not void and could be reviewed only on appeal. Prohibition would not lie to prevent the enforcement of such an order nor would mandamus lie to compel the court to proceed with the trial notwithstanding such order.

VI.

Conclusion.

For the foregoing considerations it is respectfully submitted that—

1. The appeal from the order enjoining the further prosecution of the ancillary and dependent bill should be dismissed;
2. The petition for writ of mandamus should be denied;
3. The petition for writ of prohibition should be denied.

Respectfully submitted,

GARRET W. McENENERY,

JOHN S. PARTRIDGE,

Attorneys for Receivers and Respondent.

Dated March 20, 1916.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Ex parte THE EQUITABLE TRUST COMPANY
OF NEW YORK—Original No. 169.

In the Matter of the Petition of The Equi-
table Trust Company of New York, as
Trustee, for a Writ of Mandamus—
Original No. 2757.

In the Matter of the Appeal of The Equi-
table Trust Company from the Order
Issuing the Injunction, dated February 21,
1915.

BRIEF OF
SAVINGS UNION BANK AND TRUST COMPANY,
Intervenor and Appellee.

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SAN FRANCISCO;

Filed

MAR 27 1916

F. D. Monckton,
Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ex parte THE EQUITABLE TRUST COMPANY
OF NEW YORK—Original No 169.

In the Matter of the Petition of The Equitable Trust Company of New York, as Trustee, for a Writ of Mandamus—
Original No. 2757.

In the Matter of the Appeal of The Equitable Trust Company from the Order Issuing the Injunction, dated February 21, 1915.

BRIEF OF

Savings Union Bank and Trust Company,
Intervenor and Appellee.

Since the submission of this case to this Honorable Court for decision, following the extended arguments of counsel, the petitioner and appellant has filed a brief, then a supplemental brief and, up to the present time, a third brief. We therefore feel called upon to file a brief ourselves.

Notwithstanding the voluminous record in this case, counsel for the Trustee have found it necessary or have deemed it proper and advisable to refer to and bring in facts outside of the record and they seek in this extraordinary proceeding to have this Honorable Court decide, without the parties affected being before it, questions of the gravest character involving millions of dollars. They seek to obtain such decisions upon no evidence whatever, other than affidavits, and even upon facts brought to the attention of the Court for the first time in the briefs of counsel. This can truly be called an extraordinary proceeding in this respect, at least. The Savings Union Bank and Trust Company, the Intervenor herein, has valuable rights in connection with these matters which it does not desire to lose, and we respectfully submit that none of the questions which go to the merits of the controversy and which affect the rights of the bondholders of the Western Pacific Railway Company, and none of the many justiciable controversies which appear by these proceedings to be involved, should be adjudicated in a proceeding of this kind, without a trial, but that they should be tried in a *nisi prius* proceeding in a court of equity, with the proper parties before the court, upon proper and competent evidence and according to due process of law.

In the supplemental brief filed by the Trustee is given what purports to be statements of the court below, in connection with several matters which have been presented to that court from time to time for consideration. The proceedings are not given in full

and we have no copies of these records, but upon reading the extracts which counsel have given in their brief it clearly appears to us that the controlling motive of the court below in all of these matters has been to protect the interests of the bondholders of the Western Pacific Railway Company, and we must confess our astonishment that the Equitable Trust Company of New York, whose duty it has been, and is, to protect those interests, should be here complaining of the attitude of the court because it has done and is doing that which it is and always has been the duty of the Trustee to do. The attitude of the court below is well expressed in one of the statements made by the judge and quoted by counsel for the Trustee, as follows:

“All that I desire to see is that the jurisdiction of this court is exercised in a manner so as to leave no stain on the question of its having protected those whose rights are before it for protection.”

Indeed, the principal grievance on the part of the Trustee seems to be due to its fear that the court below will decide that the beneficiaries of the trust, that is to say, the Western Pacific bondholders, are entitled to an equitable lien against the property of the Denver and Rio Grande Railroad Company and that the court may enforce this right, all of which will be against the interests of the holders of the Refunding Bonds and Adjustment Bonds of the Denver Company. The spectacle of a Trustee being opposed to a

court because its attitude is too favorable to the beneficiaries of the trust is indeed unusual.

Is it any wonder that the Trustee is receiving the active cooperation in all of these proceedings, by stipulation and otherwise, of all of the *parties* who are controlled by the Denver and Rio Grande Railroad Company?

Not only does the Trustee object to the actions of the court below but its resentment has gone to the extent of causing it to impugn the ability and integrity of the judge of that court. These attacks have not been confined entirely to the proceedings in court. As an instance of these charges, we call the Court's attention to the following question asked by Mr. Cutcheon during his argument before this Court:

"Can there be any doubt that a decision announced on the 21st day of February with the implication that it was the purpose of the court to bring these parties in here and to litigate this foreign question was intended to disrupt the plan of reorganization?" (Argument, Cutcheon, p. 183.)

The judge of the court below needs no defender before this Court, and we shall therefore say nothing upon that subject, nor shall we fully express our amazement at this astounding question, with its implication, asked by counsel appearing on behalf of the Trustee, but we submit that people who charge others with acting from improper motives are often guilty of doing those very things themselves, and the charges which they make are intended to divert attention from

their own misdoings, and we submit that the record in this case shows that such is the purpose of the Trustee in these proceedings.

Although the court below is apparently anxious to protect the interests of the bondholders of the Western Pacific Railway Company, who are the beneficiaries of the trust of which the Equitable Trust Company of New York is the Trustee, that Trust Company objects to taking any proceeding in that court to enforce or protect the rights of the bondholders in connection with the equitable lien and is trying in every way to prevent the Denver and Rio Grande Railroad Company being made a party to the foreclosure proceedings. The Trustee also insists upon the right to prosecute the claim of the Western Pacific bondholders against the Denver and Rio Grande Railroad Company, under Contract B, in the United States District Court for the Southern District of New York, and it insists upon that right although it, at the same time, claims that the trustees for the Denver Company's First and Refunding Bonds and Adjustment Bonds can not be made parties to the New York suit without ousting the jurisdiction of that court. The Trustee is therefore insisting upon proceeding with that suit in a court where no judgment of any benefit to the Western Pacific bondholders can possibly be obtained, and where a judgment may be rendered which will deprive those bondholders of all of their rights to have their equitable lien established.

As stated upon the argument in this case, the Savings Union Bank and Trust Company, the Intervenor herein, contends that the Western Pacific bondholders have an equitable lien under the provisions of Contract B against the properties of the Denver and Rio Grande Railroad Company as of June 23, 1905, and that this lien is prior and superior to that of the liens of the holders of the Refunding Bonds of the Denver and Rio Grande Railroad Company, of which there are now outstanding \$33,000,000, and of the holders of that company's Adjustment Bonds, of which there are now outstanding \$10,000,000. The Intervenor further contends that Contract B and the rights under it were mortgaged and pledged under the First Mortgage of the Western Pacific Railway Company which is sought to be foreclosed by the suit brought in the court below, and that it is not only proper but necessary to have the Denver and Rio Grande Railroad Company and the other subsequent encumbrancers on the property of that company made parties to this foreclosure suit, in order for the Court to protect and enforce the rights of the bondholders, and this Intervenor desires to protect and enforce its rights in this respect in a trial court of equity according to the rules of equity and not in an extraordinary proceeding upon affidavits or upon facts stated in briefs.

That the Trustee is not acting in the interests of the Intervenor with respect to the protection or enforcement of its rights and the rights of the other Western Pacific bondholders appears not only from

what has been heretofore said, but from the record of the Trustee itself in this case.

The Denver Company's Refunding Bonds and Adjustment Bonds were issued through the medium of Blair & Company, Read & Company and Salomon & Company (Exhibit No. 18, p. 9, Exhibit No. 22, p. 193). Blair, Read and Salomon were negotiating for more than nine months prior to March 1, 1915, with the Denver and Rio Grande Railroad Company in connection with its obligations to the Western Pacific bondholders. (Argument, Cutcheon, p. 171, Exhibit No. 21, p. 28). The Trustee, in proceeding to enforce the rights of the Western Pacific bondholders, did not act on its own initiative, but did act at the request of Blair & Company, Read & Company and Salomon & Company, "and others." (Argument, Griswold, p. 138.) The Trustee, after being so requested to institute the litigation, prepared the form of complaint which it subsequently filed in the ancillary dependent suit *before the Bondholders' Protective Committee was even formed* (Cutcheon, Ex. 21, p. 6; Krech, Ex. 21a, p. 11), and afterwards asked Mr. Cutcheon to have the Bondholders' Protective Committee request the Trustee to bring the suit, which request was so obtained. (Cutcheon, Ex. 21, pp. 6, 7.)

Mr. Cutcheon says in his affidavit, dated May 21, 1915, with respect to the prayer contained in the ancillary dependent bill wherein the Equitable Trust Company of New York asked the court to "find and declare the true meaning, construction and effect of

the said Contract B in respect of the provisions that the agreement shall run with the railways of the several companies named therein, and that said provision be enforced as against the Denver and Rio Grande Railroad Company, in accordance with the true meaning and effect thus determined by the court," and to which part of the prayer the Intervenor has called and directed the particular attention of this court (in view of the fact that it calls upon the court where the complaint was filed to decide and determine the entire question of the right of the Western Pacific bondholders to their equitable lien), that "*this prayer was not inserted at the instance of the committee or its counsel*" (p. 21). He does not say at whose instance it was inserted and so far as this record shows we must draw our own deductions as to who these parties were. But inasmuch as the Trustee was not acting on its own initiative but at the request of Messrs. Blair, Read and Salomon, can there be any doubt as to the identity of the parties who are responsible for the insertion of this prayer? Mr. Cutcheon, in his affidavit, after stating that this vital prayer was not inserted at the instance of "the committee or its counsel" states that "*the committee* did not feel that the prayer had any purpose or significance" except to indicate that no rights were being waived! How Mr. Cutcheon felt the record does not disclose.

Mr. Cutcheon further states that prior to the commencement of the suit in New York, he had several conferences with Mr. Murray and with Mr. Gris-

would, of counsel for the Trustee, "with respect to said bill of complaint and the jurisdiction and manner in which the same should be brought" (p. 7), and that they were also told by the attorney for the Denver and Rio Grande Railroad Company of certain facts which made the bringing of the bill exigent. (Cutcheon, p. 7.) This is the same Mr. Griswold who stated at the hearing of the arguments in these matters that the Western Pacific bondholders had an equitable lien and that the Trustee so contended and had always so contended.

Following these conferences "with respect to the bill of complaint, the jurisdiction and manner in which the suit should be brought," the suit was commenced in the United States District Court for the Southern District of New York, with a prayer that that court construe the meaning of those provisions of Contract B which relate to the equitable lien but without asking that court to find that the Western Pacific bondholders have an equitable lien upon the property of the Denver and Rio Grande Railroad Company as of the date of Contract B and ahead of the liens of that company's Refunding Bonds and Adjustment Bonds, *and without making either of the trustees of the holders of those bonds parties to the suit.*

Mr. Cutcheon's excuse for not making the other trustees parties to that suit is that if this had been done it would have ousted the jurisdiction of that court. (Argument, Cutcheon, p. 187.) But that is no excuse. The suit did not have to be brought at all. Certainly not in that particular court, where

those trustees never can be made parties to the suit, and where no judgment of any value to the Western Pacific bondholders can possibly be obtained and where they stand to lose everything.

Shortly after this suit was brought, Mr. Alvin W. Krech, the president of the Trustee, the Equitable Trust Company of New York, and the present chairman of the Reorganization Committee, filed an affidavit in the court below, in which he said that the Trustee brought said action "in good faith with the intention to proceed with the same and therein to enforce the liability of the Denver Company." And that "neither the mortgage trustee nor the Bondholders' Committee had or has any assurance that the receivers appointed herein would bring such a similar action against the Denver Company or *would prosecute it to an early conclusion*, even if said receivers had the legal right so to do." (Italics ours.) And that "if the Trustee is enjoined from the prosecution of its remedies against the Denver Company there will be great and real danger of a dissipation of the assets of the company," etc. (Krech, Ex. 21a, pp. 14, 15.) And at that same time Mr. Cutcheon filed an affidavit in which he said that the paramount consideration influencing him to advise the Committee to request the Trustee to file a bill, was the *necessity of haste*, to the end that the Trustee might obtain injunctions against prosecutions of certain suits and "so that the obligation of that company under Contract B might be enforced for the benefit of all the depositors with the Committee pro rata." (Cutcheon, p. 16.)

And yet both Mr. Bowie and Mr. Cutcheon stated upon the argument before this Court that this same suit was only brought merely for the purpose of maintaining the *status quo*, and that there is no intention of proceeding with it even at the present time. (Arguments, Bowie, p. 103; Cutcheon, p. 187.)

Here, we submit, is a positive contradiction in respect to the very matter about which counsel were interrogated during their argument by the members of this Honorable Court.

The most remarkable thing in all of these proceedings is that it was not until counsel for the Intervenor during his argument before this Court fully explained the nature of the right of the Western Pacific bondholders to have their equitable lien established and its immense value and great importance to those bondholders, and not until he had criticized the action of the Trustee with respect thereto, that the Trustee, being forced by questions from the Court and from counsel to announce whether it contended that the bondholders of the Western Pacific Railway Company did have or did not have an equitable lien against the property of the Denver and Rio Grande Railroad Company, then for the first time publicly admitted that it did so contend and had always so contended. (Argument, Griswold, p. 138.) Up to that moment, neither the Equitable Trust Company of New York nor the Bondholders' Protective Committee ever informed the Western Pacific bondholders that they had any right to assert such a lien nor that any attempt would be made to protect or enforce

such a lien. On the contrary, the Trustee and the Committee have continually given the Western Pacific bondholders to understand that the rights of the bondholders against the Denver and Rio Grande Railroad Company came behind and were subordinate to the rights of the holders of the First and Refunding Bonds and of the Adjustment Bonds. It may be that the matter was never properly brought to the attention of all of the members of the Committee and that the majority of the members thereof were ignorant of its existence.

In the affidavit of Mr. Cutcheon (Ex. No. 21, p. 9), it is stated, with reference to the fact that the Denver Company net earnings, *after paying* the interest *upon its Refunding Bonds and Adjustment Bonds*, amount to more than one million dollars:

“If the Denver Company remains a going concern with respectable credit, at least a large part of *this* amount and any increased earnings which it may make, *should be available*, with such earnings as Western Pacific Railway Company may make and as are applicable thereto, to the payment of the interest accruing upon Western Pacific First Mortgage Bonds.”

Again,

“Certain negotiations looking to that end” (the use of the Denver Company’s surplus earnings, *after paying the interest on the Refunding Bonds and Adjustment Bonds*, to the interest upon the Western Pacific Bonds) “were had during the winter of 1914-15 between the Denver Company and various bankers, some of them now members of the Protective Committee,” etc. (p. 13.)

The Reorganization Agreement, together with the plan and introductory statement (Ex. No. 26), is most significant in this respect. This agreement is signed by the Committee for the bondholders, of which Mr. Alvin W. Krech is Chairman. It may be well in this connection to call the Court's attention to the fact that it appears from the record that Mr. Alvin W. Krech is also the President of the Equitable Trust Company of New York, Trustee for the bondholders, and it would therefore seem that Mr. Krech can not, as Chairman of the Reorganization Committee, properly look after the interests of the bondholders who are parties to that agreement, and at the same time, as President of the Trust Company, look after the interests of the bondholders who are not parties thereto.

As showing that neither the Trustee nor the Committee has ever informed the bondholders of the Western Pacific Railway Company of the existence of the equitable lien which the Trustee now claims that it has ever contended for, we call the Court's attention to the first paragraph of the introductory statement (p. i), where it is said:

"In order to enable the holders of certificates of deposit * * * and holders of Western Pacific * * * bonds not deposited under said agreement, to judge of the propriety and expediency of the annexed Plan of Reorganization * * * the Protective Committee has thought it best * * * to review in this introductory statement * * * the relations between it" (Western Pacific Railway Company)

"and the Denver and Rio Grande Railroad Company."

Following this, and on page vi of this introductory statement, under the heading, "Purposes and General Considerations," it is stated:

"The financial condition of the Denver Company is such that it has seemed possible that it may become necessary for the Holding Company to take measures to *protect its claim* against the Denver Company, and for that reason provision is made in the plan for the raising of funds, if necessary to *prevent the extinguishment by means of the possible foreclosure of mortgages* upon the Denver Company's property of the claims to be acquired by the Holding Company. The Adjustment Mortgage of the Denver Company, under which there are outstanding \$10,000,000, principal amount, of Adjustment Mortgage Bonds, is now in default (although the interest on these bonds has been regularly paid) by reason of the failure to pay interest upon Western Pacific First Mortgage Bonds, and, should this Adjustment Mortgage be foreclosed, the Refunding Mortgage of the Denver Company securing bonds in the principal amount of more than \$33,000,000 (exclusive of about \$7,000,000 thereof pledged under the Adjustment Mortgage) may come into default. For the same reason and because of the position that the Western Pacific property occupies in relation to other railway properties and the resulting necessity of protecting its traffic relations, the Protective Committee has deemed it extremely important that power shall exist also to make use of a portion of the proceeds of the \$20,000,000 of New Bonds in such manner as may seem to the Reorganization Committee prior to the completion of the reorganization and thereafter to the Board of Directors of the Hold-

ing Company most advantageous in the interest of the reorganization. Accordingly in clause (b) of Article V of the Plan reasonable latitude in the application of a portion of the moneys to be raised has been provided for.

"The necessity of providing for a common agency for the enforcement and protection of the claims against the Denver Company and of raising funds if needed for this purpose is one of the reasons for the formation of the Holding Company." (*Italics ours.*)

And on page 19 of the Plan, under the heading, "Non-assenting Holders of old Bonds," it is stated:

"Bondholders who shall have withdrawn their bonds from the operation of the *Protective Agreement* and the holders of Old Bonds who shall not have deposited their bonds under the Protective Agreement or hereunder will not be entitled to participate in the Plan or the benefits thereof to any extent, and will receive *only* their distributive shares of any balance of the *proceeds derived from the sale* of the mortgaged property of the Old Company that may remain after the discharge of obligations and liabilities entitled to prior payment under the terms of the foreclosure decree and orders of Court." (*Italics ours.*)

There is not one word in the introductory statement, in the Plan, or in the Agreement of Reorganization, from the first paragraph to the last, which suggests the possibility of the Western Pacific bondholders having an equitable lien against the property of the Denver and Rio Grande Railroad Company. On the contrary, the Denver Company's Refunding Bonds and Adjustment Bonds are at all times referred to as encumbrances upon the property of the

Denver and Rio Grande Railroad Company which are superior to and which come ahead of the rights of the Western Pacific bondholders, and, as will be seen from that which is quoted, the Refunding Bonds and the Adjustment Bonds are treated not only as being prior and superior to the bonds of the Western Pacific Railway Company, but as being, on that account, such a menace to the Western Pacific Bondholders that the Committee desires the power to use a material portion of the \$20,000,000 new money which is to be obtained through the plan of reorganization, in order to "protect" the rights of the Western Pacific bondholders and "to prevent the extinguishment" of their claims; which means, we assume, that the new money will be used to purchase the Adjustment Bonds. And yet the Trustee now contends, and says that it has always contended, that the Western Pacific bondholders have an equitable lien upon the property of the Denver and Rio Grande Railroad Company ahead of the Refunding Bonds and Adjustment Bonds. We are indeed glad to know that the Trustee does so contend, but we respectfully submit that this Court will look in vain through the entire record of these proceedings to find a single instance where the actions of the Trustee have borne out its present contention, but, on the contrary, the Court will find abundant evidence of the fact that the Trustee has acted at all times in a manner quite at variance therewith.

Why did the Committee undertake to inform the bondholders of all the facts with respect to the relations between the two companies and not only say

nothing about the equitable lien but treat it as not existing?

Furthermore, we beg to call the Court's attention to the statement made by Mr. Jared How, in his opening argument on behalf of the Trustee, in stating his position, before this Honorable Court. In referring to that part of Contract B, which provides that the obligations thereof shall run with the railways into whosoever hands they may come, Mr. How said:

"That provision is causing a great deal of trouble,—'shall run with the railways.' I do not envy any man his task to establish that the personal covenant of these railway companies to pay money is a covenant running with the land."
 * * * If it is a personal covenant and can not be made, even though the assigns be named, to bind the assigns, can it be twisted into what is called an equitable charge, although not intended to be that, anyway?" (Argument, How, p. 27.)

This is certainly a strange statement to be made on behalf of a Trustee who now contends, and who now claims that it has ever contended, that these provisions of Contract B do establish an equitable lien against the property of the Denver and Rio Grande Railroad Company. Let us suppose that Mr. How had appeared on behalf of the Trustee in the ancillary dependent suit in New York, wherein the Court was asked to construe these provisions of Contract B, and that he had made to that Court that same statement with respect to the position of the Trustee in connection with the equitable lien, and that thereupon the

Denver and Rio Grande Railroad Company, on the other side, had stated to that Court that it agreed with Mr. How entirely and that it denied that any such lien exists, would that Court have gone any further? Would not that Court have probably then and there directed that judgment be entered in favor of the Denver and Rio Grande Railroad Company, and would the result not have been that the rights of the Western Pacific bondholders in this respect would have been lost forever?

* * * * *

Counsel for the Trustee now say in their brief that the question of the equitable lien is "a matter of doubt" and they refer to what they say is a "similar covenant" in the case of *Des Moines R. R. v. Wabash*, 135 U. S. 576, which was held not to create a lien.

A careful reading of that decision will, we think, convince this Court that the Trustee does not yet appear to be looking for law in favor of the beneficiaries of its trust, and that there is still a remarkable lack of that fidelity and enthusiasm which the bondholders might expect to find in the champion of their rights.

In the case referred to there was a contract covering traffic arrangements between two roads, and it was provided that the "contract and any damages from a breach of the same" should be a continuing lien upon the roads of the two contracting companies, their equipment and income, into whosoever hands they might come, etc. The Court said:

"It can hardly be supposed that the *conjectural damages* and the *speculative profits* which might yet result to the company from the unperformed part of the contract, through eighteen or twenty years, are to be made a specific lien on the property, attached to it and passing into the hands of whoever might become its purchaser."

But the Court preceded this statement by saying that,

"If * * * *there was a sum of money due, and ascertained or readily ascertainable, this sum might be a lien on the income or property of the delinquent company,*" etc.

It will thus be seen that the Court, while recognizing the propriety of declaring a lien for a sum of money ascertained or readily ascertainable, did not approve of such a lien for "conjectural damages" or "speculative profits." In that case the Court did not discuss the doctrine of equitable liens nor refer to the case of *Ketchum v. St. Louis*, 101 U. S. 306, cited by us upon the argument, which decision has been relied upon by the United States Supreme Court in many cases decided after the *Des Moines* case as establishing the true rule on the subject of equitable liens; nor was there in that case, as here, a provision that the property should be held to be the subject of an express trust. The *Des Moines* case has never since been approved nor cited by that Court. Moreover, that case would seem to furnish a reason why the plan of the Trustee to obtain a judgment for damages against the Denver and Rio Grande Railroad Company, on account of its failure to perform the obligations un-

der Contract B, as announced by counsel for the Trustee, should not be followed, and to be another ground for the affirmance of the order made by the lower court in this case.

The Western Pacific bondholders may, however, find comfort in the thought that if this Trustee, searching for the law with glasses colored as its apparently are, nevertheless still believes and contends that the equitable lien exists, the bondholders have the most excellent prospects of having this lien finally established and enforced.

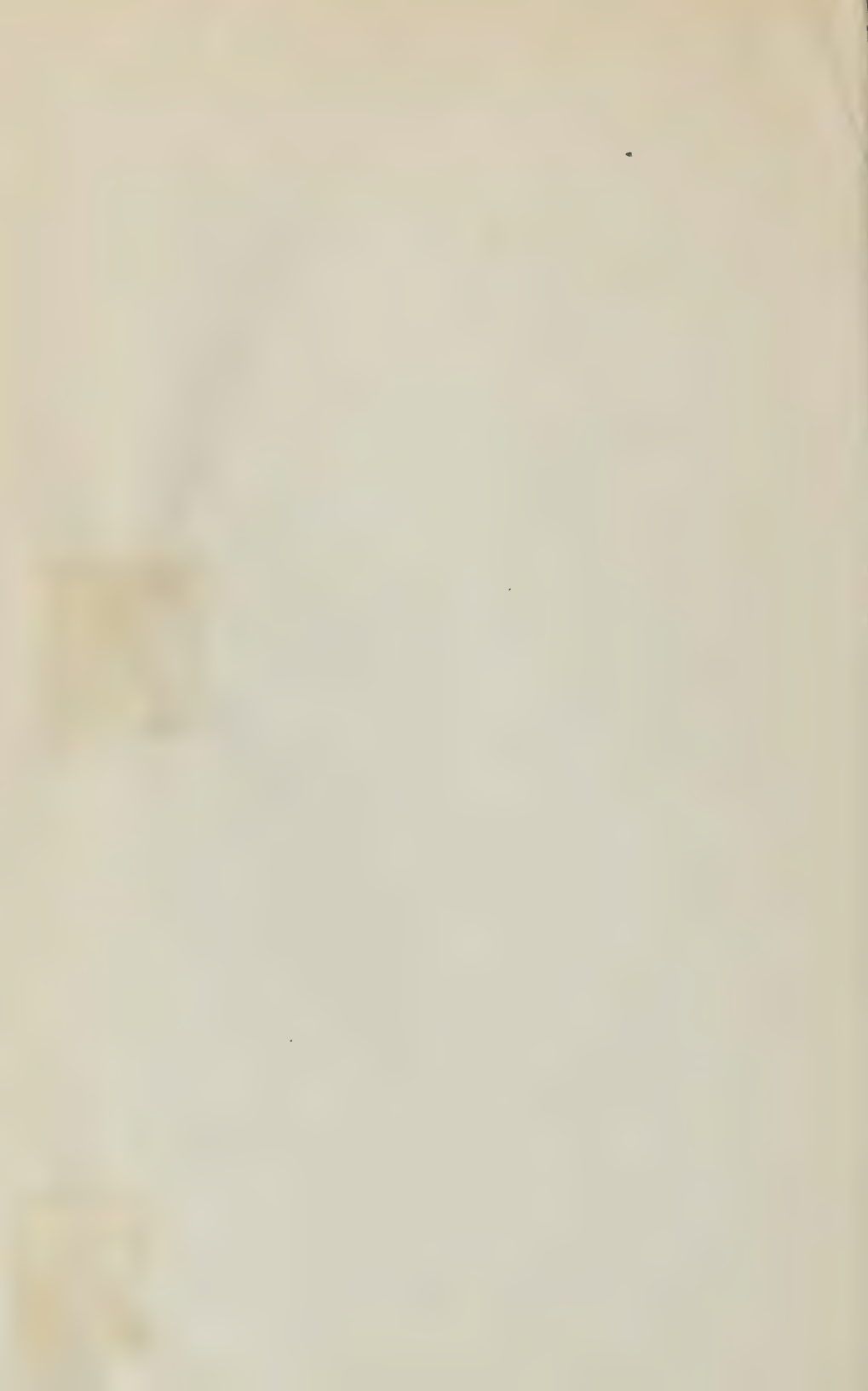
During the final argument on behalf of the Trustee much was said to the effect that if the present plan of reorganization should fail it would be detrimental to the interests of the Western Pacific bondholders. In reply to this line of argument we say that the Intervenor of course recognizes the right of every bondholder to enter into such arrangements as his interests may dictate and it has no desire to, nor will it, interfere therewith, except insofar as it may be necessary to do for the protection of the rights of itself and of those whom it represents. The Intervenor does not believe, however, that there is much in the calamity arguments which are being made on behalf of the Trustee. If the reorganization plan should fail, as a result of the Court's taking the proper steps to protect and enforce the rights of the bondholders, and the bondholders should then become the owners of this entire road, free and clear of encumbrance, and free to make such arrangements with the Denver and Rio Grande Railroad as they saw fit, and with

all of their rights against the latter company being protected and enforced, can there be any question that the rights of the bondholders under those conditions would be infinitely greater and more valuable than shares of preferred and common stock in a company which will have a present mortgage debt of \$20,000,000, capable of being increased to \$50,000,000, and where a large portion of the proceeds of the sale of the bonds now to be issued under this mortgage are to be used to purchase the Adjustment Bonds of the Denver and Rio Grande Railroad Company? The Western Pacific Railway is in a better condition today than it ever has been in its history and is now earning over \$1,500,000 annually in excess of the cost of operation. There is no necessity for sacrificing the interests of the bondholders and we submit that the threatened calamity does not impend.

Respectfully submitted,

PILLSBURY, MADISON & SUTRO,
Attorneys for Intervenor.

FRANK D. MADISON,
Of Counsel.



IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EX PARTE THE EQUITABLE TRUST COM-
PANY OF NEW YORK—ORIGINAL NO. 169.

IN THE MATTER OF THE PETITION OF THE
EQUITABLE TRUST COMPANY OF NEW
YORK, AS TRUSTEE, FOR A WRIT OF MAN-
DAMUS—ORIGINAL NO. 2757.

IN THE MATTER OF THE APPEAL OF THE
EQUITABLE TRUST COMPANY FROM THE
ORDER ISSUING THE INJUNCTION, DATED
FEBRUARY 21, 1916.

**REPLY TO BRIEF OF SAVINGS UNION BANK
AND TRUST COMPANY.**

MURRAY, PRENTICE & HOWLAND,
JARED HOW,
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Attorneys for Equitable Trust Company
of New York.

F. W. M. CUTCHEON,
JOHN F. BOWIE,
Amici Curiae.

Filed

MAR 28 1916

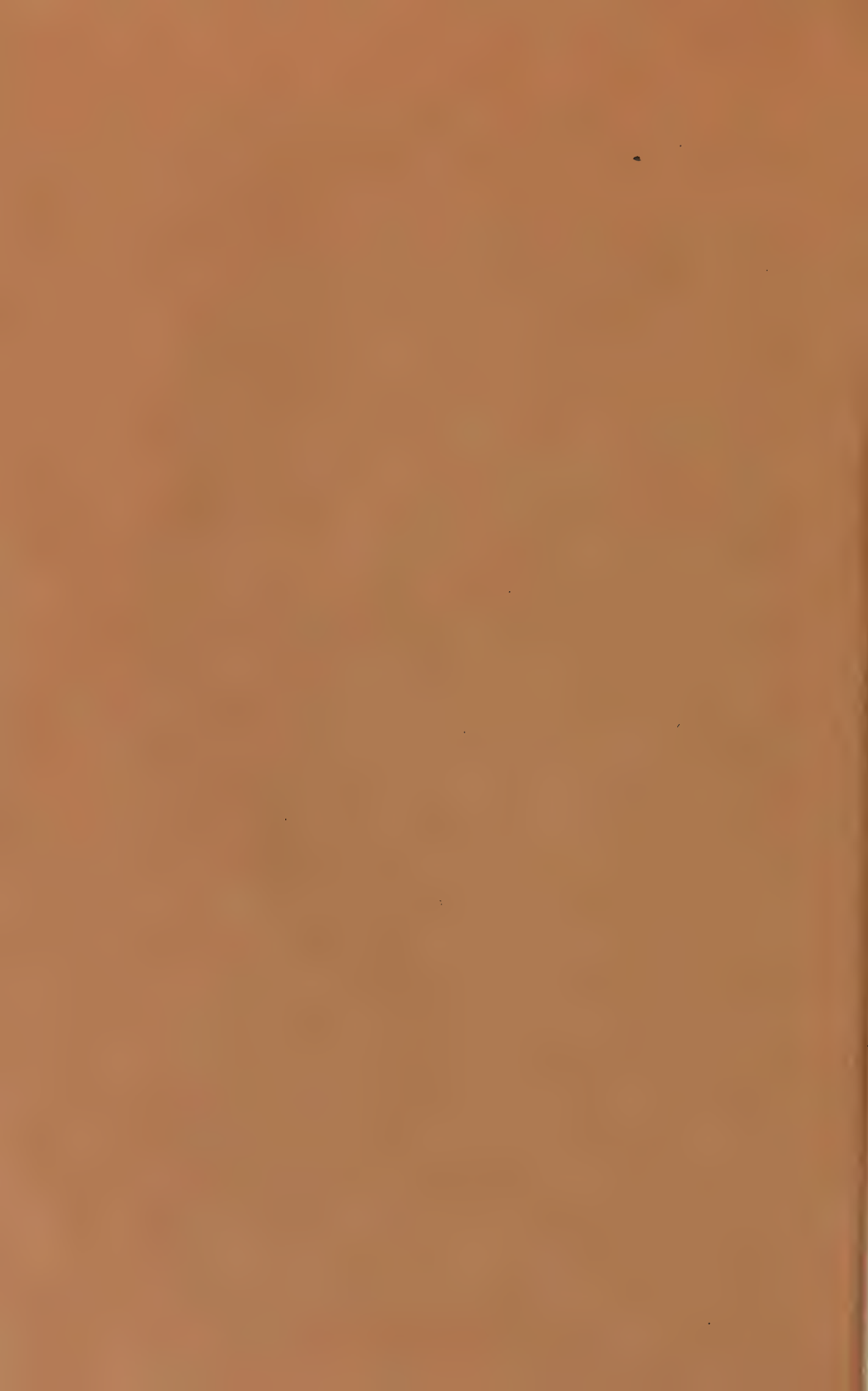
Filed this.....day of March, 1916.

F. D. Monckton,

F. D. MONCKTON, Clerk.

Clerk,

By....., Deputy.



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

Ex parte The Equitable Trust Company
of New York, Original No. 169.

In the Matter of the Petition of The
Equitable Trust Company of New York,
as Trustee, for a Writ of Mandamus,
Original No. 2757.

In the Matter of the Appeal of The
Equitable Trust Company from the
Order Issuing the Injunction, dated
February 21, 1916.

**REPLY TO BRIEF OF SAVINGS UNION BANK AND
TRUST COMPANY.**

In the briefs heretofore filed but incidental attention has been paid to the petition for intervention of the Savings Union Bank and Trust Company. On March 27th a brief was filed in support of that petition, and as the statements contained in this brief might lead to confusion, we will reply thereto by stating the facts shown by the record.

At the time the motion for entry of decree was made in the lower court, no petition for intervention had been presented by the Savings Union. On the afternoon of March 6th, the hearing of the motion for decree having been continued from morning till afternoon, the Savings Union asked leave to intervene for the sole purpose of being heard on the question of the *up-set price*. The Savings Union asked that an up-set price of \$40,000,000 should be fixed. This petition was never heard, and on March 13th a petition for intervention, accompanied by a bill in all respects similar to that presented with the petition for intervention filed here, was presented in the lower court. Time to answer this petition filed in the lower court has not as yet expired.

On the hearing of the proceedings on mandamus and prohibition a petition for intervention was filed in this Court.

As the questions presented to this Court related to the validity of the proceedings in the lower court taken at a time prior to the presentation of such petition, it is apparent that the petition has no legal relevancy to the proceedings pending in this Court. It is in fact a mere attempt to afford a basis on which orders made before its presentation may rest, an attempt to create a record justifying judicial action after that action had taken place. This, of course, cannot be done, but were it otherwise, the petition for intervention does not afford such a basis. The claim of the intervenor is:

(a) That the obligation of the Denver Company to make the payments of interest and sinking fund required by Contract B is secured by an equitable charge on the properties of the Denver Company.

(b) That this equitable charge is prior to the liens created by the Adjustment and Refunding Mortgages of the Denver Company.

(c) That three Banking houses in New York, each of whom has a representative on the Reorganization Committee, are interested in the Adjustment and Refunding bonds of the Denver Road, and do not desire to see these bonds declared subordinate to the equitable charge arising from Contract B.

(d) That it is the intention of the Reorganization Committee to deprive the non-assenting bondholders of their rights under Contract B.

(e) That the Bankers interested in the Adjustment and Refunding bonds dominate the Reorganization Committee and the Trustee.

For these reasons the intervenor asks leave to intervene, in the foreclosure suit and therein to sue the Denver Company and the trustees of the Adjustment and Refunding bonds, to foreclose the equitable charge created by Contract B, and establish its priority over the Adjustment and Refunding Mortgages.

The verification of the Complaint in Intervention is in the following form:

United States of America,
Northern District of California—ss.

JOHN S. DRUM, being duly sworn, deposes and says: That he is an officer, to wit, the President, of SAVINGS UNION BANK AND TRUST COMPANY, the intervenor named in the foregoing complaint of intervention, and knows the contents thereof; that he is credibly informed with respect to the truth of all of the facts set forth in said complaint and believes the same to be true.

JOHN S. DRUM.

Such a verification is wholly insufficient as an affidavit, and affords no proof of the charges made.

Clark v. Nat. Linseed Oil Co., 105 Fed., 792.

But even if the bill were properly verified, the record in the case shows that the charges of fraud are made in willful disregard of the facts disclosed by the record.

CONTRACT B.

The entire complaint in intervention is based on the theory that Contract B creates an equitable charge on the properties of the Denver Company, superior to the Adjustment and Refunding Mortgages.

Even if this claim be not well founded still the Reorganization Committee and the Trustee intend to assert this very claim against the Denver Company, but do not intend to press any litigation involving this claim to decree, until after foreclosure of the

Mortgage on the properties of the Western Pacific.

Does this difference in point of view as to the time at which this claim is to be asserted form any basis for inferring fraud, or permitting intervention in the foreclosure suit, even if such inference be indulged?

As under the proposed Plan of Reorganization not one dollar of money or property goes to any person other than the holder of a First Mortgage bond, and as indebtedness of \$55,000,000 subordinate to the lien of the First Mortgage is wiped out and accorded no recognition, though the Denver Company is the person to whom this debt is owed, there is no room for any charge of fraud connected with the pending proceeding. Accordingly, the right of intervention is claimed on account of a fraud which the intervenor is credibly informed the Trustee intends to perpetrate hereafter in a different proceeding.

Obviously the intervention is sought in the wrong proceeding.

But apart from this the entire claim is founded upon a distortion of facts.

THE QUESTION OF EQUITABLE CHARGE.

As stated in the petitioner's brief, the right to realize upon the property mortgaged cannot be suspended because the interest on the mortgage may be guaranteed, and the guaranty of the interest may be secured by an equitable charge. As, however, so much has been said upon the question of the equitable charge,

and as inferences of fraud are drawn from the fact that proceedings to realize upon the guaranty of interest have been delayed, we will state in some detail the actual facts and considerations which moved the Reorganization Committee to delay proceedings under Contract B till after foreclosure and sale of the properties of the Western Pacific.

In a contract entered into between the Denver & Rio Grande Railroads and the Western Pacific Railway on the 22nd day of June, 1905, the Denver Companies agreed to enter into three contracts with the Western Pacific. One was Contract A. The covenant in the agreement of June 22nd, pursuant to which Contract A was executed, provided that under Contract A the Denver Companies should agree to purchase Second Mortgage bonds of the Western Pacific in such amount as might be required, after the application of the proceeds of the First Mortgage bonds, to complete the acquisition, construction and equipment of the main line of the Western Pacific Company from Salt Lake City to San Francisco, with adequate terminals and other property necessary for use in connection with said main line.

The second was Contract B. This agreement has been much discussed, and the covenant contained in the contract of June 22, 1905, pursuant to which Contract B was executed, provided that under Contract B the Denver Company should loan to the Western Pacific Company, upon its unsecured prom-

issory notes, moneys sufficient, after application of the proper available income of the Western Pacific Company, to provide operating expenses, taxes and interest on its First Mortgage and sinking fund. This provision also require that Contract B should obligate the Denver Company to pay directly to the Trustee moneys sufficient to pay interest and sinking fund.

Pursuant to this contract of June 22, 1905, Contracts A and B were executed, these contracts being executed on the same day, to wit, June 23, 1905.

By Contract A the Denver Company obligated itself to purchase Second Mortgage bonds of the Western Pacific Company to such extent as might be necessary to complete the Western Pacific, after there had been applied to construction the proceeds of the First Mortgage issue. It was clearly contemplated by this contract that the Denver Company might be called upon to lay out \$18,750,000 in this manner. As an actual matter of fact, the Denver Company was called upon to lay out, in the completion of the construction of the Western Pacific, approximately \$33,000,000.

On the same day Contract B was executed. The following facts should be noted:

1. Contract B was never recorded.
2. Contract B did not purport to create a legal charge upon the property of the Denver Company, or a mortgage on the income of the Denver Company.

It did purport to provide against alienation by the Denver Company of its properties under any circumstances, unless the purchaser acquiring the properties of the Denver Company on such alienation taking place should assume the burdens and obligations of Contract B.

No question has arisen, or can ever arise, concerning the liability of the Denver Company under Contract B, but the very moment that it is asserted that Contract B creates a charge prior to the Adjustment and Refunding Mortgages of the Denver Company, controversies of the most bitter character immediately arise. Whatever the result of such controversies may be, it will be contended, that inasmuch as the Denver Company, then owing \$80,000,000, undertook on the same day on which it entered into Contract B to supply the funds necessary to complete the Western Pacific, clearly it could not have been intended that Contract B should create a charge upon the properties of the Denver Company which would prevent that road from raising by mortgage the moneys essential to the performance of Contract A.

Again, it will be contended that the reference to Contract B contained in the Adjustment and Refunding Mortgages are not sufficient to put the purchasers of bonds on notice that Contract B actually created an equitable charge. Again, questions will arise concerning the validity of the provision declaring that the Contract should run with the respective railways, for only certain types of covenant run with the land,

and it has not yet been determined that covenants of the class herein mentioned fall within the character of covenants which may lawfully run with the land.

It is obvious that questions of this class, involving millions of dollars, could not be finally adjudicated with rapidity, nor would any decree be accepted as final short of that of the Supreme Court of the United States.

The only action that could be brought under Contract B prior to the foreclosure and sale of the assets of the Western Pacific was an action by the Trustee to recover the interest then accrued. If such action were brought and the judgment paid, a new action would have to be brought for the next instalment, and if this procedure were followed, the Western Pacific Railroad would stay in possession of the Receivers for all eternity, and the Trustee would merely continue to sue upon the guaranty for payment of interest. As, however, the Denver Company owes between \$123,000,000 and \$124,000,000, and as its income was not sufficient to pay the interest on its own debt and the interest on the First Mortgage of the Western Pacific, and as a bond issue of the Denver Company in the principal amount of \$10,000,000 was in default, though the default did not arise from the failure to pay interest, it would, in the opinion of any reasonable man, be perfectly obvious that a decree against the Denver Company, whether that

decree established Contract B as a charge prior to the Adjustment and Refunding bonds, or as a charge subsequent to those bonds, could result in nothing but receivership of the Denver Company. It is also quite obvious to any one knowing the condition of the Denver Company that such receivership would stop the payment of interest on bond issues of the Denver Company prior to that of the Refunding Mortgages.

Under these circumstances, the only sensible course to pursue was to foreclose the Western Pacific mortgage and proceed against the Denver Company, not merely for the specific performance of its contract to pay interest, *but for a judgment in a capital sum equal to the damage sustained by the Western Pacific bondholders through the breach of the obligation of the Denver Company to pay interest. Such a judgment could only be obtained after the Western Pacific properties had been sold on foreclosure, and the amount of the deficiency ascertained.* If, after the rendition of such a judgment, the Denver Company went into receivership, this judgment, which it was estimated would amount to between \$20,000,000 and \$30,000,000, would become one of the principal claims against the Denver Company, if prior to the Refunding bonds that priority could be established. If subsequent to the Adjustment and Refunding bonds, still it came ahead of all of the stock of the road,

and was a claim of large amount and real value, provided there existed in the hands of the holder sufficient funds to protect the claim on reorganization. Such funds were provided by the Reorganization Plan of the Western Pacific road through the underwriting of bonds to be issued by the new corporation.

We respectfully submit that it cannot honestly be said that the failure to assert the claim against the Denver Company on Contract B, and to reduce that claim to judgment prior to foreclosure and decree, is fraud. On the contrary, any other procedure would be willful and deliberate sacrifice of the rights of the holders of bonds of the Western Pacific Company under the guaranty contained in Contract B. Yet, such is the claim of fraud upon which the petition for intervention is filed.

The obvious propriety of the course adopted of itself completely refutes the charges of fraud, which are made either in complete ignorance, or through malice.

The claim that the Plan of Reorganization contemplates depriving non-assenting bondholders of their rights under Contract B is absurd. The holder of a single bond has the right to insist that an action be brought to enforce that Contract. The provision of the Plan restricting the right of benefit to those joining therein refers only to benefits derived under the

Plan, and does not purport to destroy the right of non-assenting bondholders.

Respectfully submitted.

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JARED HOW,

W. E. S. GRISWOLD,

Attorneys for The Equitable Trust Company
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F. W. M. CUTCHEON,

JOHN F. BOWIE,

Amici Curiae.

Dec 2755, 2757 ¹²¹
2756

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THE EQUITABLE TRUST COMPANY OF
NEW YORK,

Plaintiff,

VS.

WESTERN PACIFIC RAILWAY COM-
PANY,

Defendant.

BRIEF ON APPEAL

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Filed

MAY 2 1919

F. D. Monckton,
Clark

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THE EQUITABLE TRUST COMPANY OF
NEW YORK,

Plaintiff,

VS.

WESTERN PACIFIC RAILWAY COM-
PANY,

Defendant.

BRIEF ON APPEAL

I.

No Suit in Equity or Formal Proceeding is Necessary to Found a Basis for Injunction to Prohibit a Party from Further Prosecuting an Action Which Amounts to an Interference with Matters in the Custody of the Court.

In *Ex Parte Tyler*, 149 U. S. 164, the Supreme Court said:

“The property in question was in the custody of the circuit court, in a cause within its jurisdiction, and protected by injunction. The power exercised was the power to protect the property in the custody of the court from invasion, and in order to sustain the receiver’s application the

ordinary grounds of equity interposition were not required to be set forth."

In that case, as in this, the general order appointing the receivers contained a clause enjoining all persons from interfering with them. In that case, as in this, the matter was brought to the attention of the Court in an informal manner.

The Supreme Court say:

"Ordinarily the court will not allow its receiver to be sued touching the property in his charge, nor for any malfeasance of the parties, or others, without its consent; and while the third section of the Act of Congress of March 3, 1887 (24 Stat. at L. 552, chap. 373) now permits a receiver to be sued without leave, it also provides that 'such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice'. Neither that nor the second section, which provides that the receiver shall manage the property 'according to the valid laws of the state in which such property shall be situated', restricts the power of the circuit courts to preserve property in the custody of the law from external attack.

"In this case, instead of issuing an attachment against the petitioner at once for forcibly seizing the rolling stock of this railroad under the circumstances appearing upon the face of the rec-

ord, the court adopted the course of serving him with a rule to show cause, and with an order restraining him, in the meantime, from interference with the property. The petitioner refused to release the property upon request of the receiver, and persisted in his attempt to hold possession thereof by force in disregard of the order of the court."

The general rule is laid down in *Beach on Receivers*, as follows:

"And a receiver is entitled to an injunction to restrain unauthorized interference with the property in his possession even as against strangers who are not parties to the receivership proceeding, and in such case the court may properly allow him to proceed by petition in the receivership suit and need not require him to resort to an independent action in equity."

And again, Section 747, the learned author says:

"Injunctions to protect receiver's possession.

"The aid of an injunction is sometimes a necessary adjunct to a receivership for the purpose of protecting the receiver's possession, and to prevent any unauthorized interference, by suit or otherwise, with the property or fund intrusted to his care. Indeed, so jealous are courts of equity of any unauthorized interference with the possession of their receivers, that they usually require all adverse claimants to come in and

assert their rights in the action in which the receiver was appointed. And when parties asserting a right to property which is subject to a receivership attempt any unauthorized interference therewith, or institute actions for its recovery against the receiver, without first obtaining leave of the court by which he was appointed, that court may enjoin them from proceeding, and thus compel them to assert their rights in the same forum in which the receiver was appointed."

In *Krippendorf v. Hyde*, 110 U. S. 276, it is said:

"The equitable powers of courts of law over their own process to prevent abuse, oppression and injustice are inherent and equally extensive and efficient, as is also their power to protect their own jurisdiction and officers in the possession of property that is in the custody of the law."

II.

We have attached hereto our brief filed in the lower court:

IN THE
DISTRICT COURT

FOR THE
UNITED STATES

NORTHERN DISTRICT OF CALIFORNIA,
SECOND DIVISION.

THE EQUITABLE TRUST COM-
PANY OF NEW YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY
COMPANY,

Defendant.

IN EQUITY.
No. 169.

**MEMORANDUM OF POINTS AND AUTHOR-
ITIES ON ORDER TO SHOW CAUSE**

This matter is before the Court upon an order, addressed to the plaintiff, directing it to show cause why it should not be restrained from further prosecuting a certain "dependent action" in the Southern District of New York.

On the 2nd day of March, 1915, the said plaintiff filed its bill, in ordinary form, for the foreclosure

of a mortgage given by the Western Pacific Railway Company. This bill alleged the complete insolvency of the Railway, and its default upon the interest on its bonds, amounting to \$1,0,250,000, and prayed for a foreclosure, and sale of all the property of the defendant. A copy of the mortgage was attached as an exhibit to the bill.

On the same day, the defendant filed its answer, admitting all the allegations of the bill, and joining in the prayer for a receiver.

Upon these pleadings, the Court made and entered its order appointing Frank G. Drum and Warren Olney, Jr., receivers of *all* the property of the defendant, including all contracts and choses in action, accounts, etc.

In accordance with this order, the receivers took possession of the railroad, and have since conducted its business.

Subsequently, the plaintiff, with leave of Court, filed an amended bill of complaint, substantially the same as the original bill, except that the prayer was for a sale of all the property of the Railway, excepting certain features of a certain "Contract B". A copy of the Mortgage was also attached to this amended bill. The defendant filed a similar answer to this amended bill, and the Court thereupon made the same order for the appointment of the receivers.

This amended bill of complaint contains an allegation that under the terms of the mortgage, there was conveyed to plaintiff's predecessor, Bowling

Green Trust Company, certain detailed property of the defendant. Among the things so alleged to be conveyed was:

“An agreement with the Denver and Rio Grande Railroad Company, the Rio Grande Western Railway Company and the Trustee hereunder, whereby said three railroad companies agree, among other things, to maintain a joint transportation system, and whereby the Denver and Rio Grande Railroad Company and the Rio Grande Western Railway Company also jointly and severally agree, so long as any of the bonds secured hereby shall remain unpaid, principal or interest, to purchase unsecured obligations of the Railway Company to such amounts as will yield moneys sufficient, *after application of the proper, available income of the Railway Company* and other moneys appropriated by it for the purpose, to provide for the payment of the Railway Company's operating and maintenance expenses, taxes, the interest upon the bonds secured hereby, the annual payment to be made into the sinking fund provided for hereby, any other expense that may be necessary to assure the continued operation of the Railway Company's property and the unimpaired lien and priority of this indenture, any taxes that the Railway Company may be required by law or permitted to pay upon or deduct from the principal or interest of the bonds secured thereby and all interest

upon indebtedness of the Railway Company other than said bonds, and to pay the purchase price of said obligations, so far as such payments shall be necessary to provide for the payment of the interest upon the bonds secured hereby and the payments to be made into the sinking fund for the redemption of said bonds to the Trustee, at such times and in such manner as to make the same available for the payments to be made therewith as aforesaid."

This is the agreement known as "Contract B".

This amended bill of complaint also alleges that that on July 1, 1908, the defendant executed a second mortgage upon its property to the Central Trust Company of New York. It is likewise alleged:

"Twelfth: That by reason of said default in the payment of interest the security created by the said First Mortgage has become enforceable, and this suit is brought for the foreclosure of the said Mortgage, the sale of the trust estate, *and the enforcement of the security created by the said First Mortgage*, and the protection of the rights and interests of the holders of the First Mortgage Five Per Cent Thirty Year Gold Bonds."

It is worth while to note, at this point, that the amended bill, by its averments, is brought for "the sale of the trust estate, *and the enforcement of the security created by the First Mortgage*," and that a part of the security of the First Mortgage is "Contract B".

On the 19th of May, 1915, the receivers filed in this Court a report, setting up all the contracts and agreement with the Denver and Rio Grande and the Missouri Pacific. In that report, they stated that the relations were so complicated, the accounts were so involved, and so many and difficult questions of law, fact, and policy were involved, that they did not feel prepared to ask the Court for definite instructions; accordingly, they requested six months time to investigate, and make recommendations for instructions. This report set out "Contract B" in full. Upon the filing of this report, the Court made an order, directing that it be heard on the 14th of June, and further directing that it be served on the parties to this action, and all corporations who were parties to any of the contracts, not later than the 19th day of May. This was accordingly done.

On the 26th day of May, the plaintiff filed, in the District Court for the Southern District of New York, its bill for foreclosure, in the same words as the amended bill in this Court, and an order was made there appointing Mr. Drum and Mr. Olney ancillary receivers. This was without the knowledge of the receivers.

On May 27th the plaintiff filed a bill in New York, which is entitled as of the ancillary bill, and also has the sub-title of "Ancillary Dependent Action in Equity," against the Denver and Rio Grande, the Western Pacific, and two fictitious defendants. This dependent bill was filed without leave of this Court, or the New York Court.

This dependent bill alleges the execution and delivery to its predecessor of the said First Mortgage, and a copy of that document is attached to it as an exhibit. The dependent bill also alleges that "Contract B" was conveyed by the Western Pacific, as part of the security of the First Mortgage. It likewise alleges that by "Contract B", a through line of railroad was established to the Pacific Coast. The dependent bill then contains the following:

"That in consideration of the matters aforesaid, and in order to procure the completion of the railroad of the Western Pacific Company, and the resultant opening and operation of the said joint through line necessary to secure to the promising companies (being the parties of the first part to said contract) an outlet to the Pacific Coast, and also to enable the Western Pacific Company to sell its said First Mortgage Bonds at a higher price and upon more advantageous terms than it could sell the same if said agreement were not so made and pledged under the said First Mortgage, the Old Denver Company and the Rio Grande Western Company, jointly and severally, covenanted and agreed with the Western Pacific Company and with the Trustee under the Western Pacific Company's First Mortgage as aforesaid, to pay semi-annually to the Trustee of said mortgage, beginning February 26, 1909, and continuing until all of the bonds secured by the Western Pacific Company's First Mortgage should be

fully paid, principal and interest, such sum of money as should be necessary *in addition to the earnings of the Western Pacific Company* and other moneys actually and lawfully appropriated by it for the purpose, to meet the interest and sinking fund payments upon the issue of bonds secured by the said First Mortgage, and provided for therein, promptly and at the time and place stipulated in the said mortgage, and to pay any taxes which the Western Pacific Company might be required or permitted to pay thereon or to deduct therefrom."

There are also allegations that, under the terms of "Contract B", the obligations of the parties run with the respective railroads.

The dependent bill also alleges as follows:

"That by and according to the terms of the said Contract B, the companies there promising, now the defendant the New Denver Company, became bound to pay unto the Trustee under the Western Pacific Company's First Mortgage, from and after September 1, 1908, or the earlier acquisition or completion of the Western Pacific Company's main line of railroad from San Francisco to Salt Lake City, such amount as would, together with the amount actually and lawfully appropriated by the Western Pacific Company *out of its earnings and other income*, and by it paid over to its fiscal agent in the City of New York or its fiscal agent in the City of San Francisco, or both of them, for the

purpose of paying the interest to fall due during the then current calendar half year upon the Western Pacific Company's First Mortgage bonds upon which interest should be payable, be sufficient to pay all such semi-annual installment of such interest; and such further amount, as would, together with the amount actually and lawfully appropriated by the Western Pacific Company out of its earnings and other income, and by it paid over to the mortgage trustee for the purpose of meeting the sinking fund payment, if any, required by said mortgage to be made by the Western Pacific Company during the then current calendar half year, be sufficient to meet such sinking fund payment.

“That as your orator is informed and believes and therefore avers, the Western Pacific Company has at various times and during various periods since March 1, 1908, *made and received earnings and other income which might properly have been lawfully appropriated and paid by it to the mortgage trustee on account of one or both of the said classes of payments*, to wit, sinking fund payments and interest payments, as aforesaid, but the amount thereof is unknown to your orator, save as your orator is informed and believes and therefore avers that the same was insufficient upon the maturity of each semi-annual payment due to the sinking fund as aforesaid, and upon the maturity of

each semi-annual installment of interest as aforesaid, to pay or meet the whole thereof; and that under the provisions of the said Contract B, a liability and obligation arose on the part of the defendant the New Denver Company upon the occasion of the maturity of each such semi-annual installment of interest and upon the occasion of the maturity of each such semi-annual payment due to the sinking fund, to pay to the said mortgage trustee a sum which, together with any mortgage theretofore actually paid by the Western Pacific Company to the mortgage trustee for that purpose, should make up the whole sum then due for a sinking fund payment or interest payment as aforesaid, but the exact amount of such deficiency or such liability is to your orator unknown."

The dependent bill then sets out the proceedings in this Court, as a Court of primary jurisdiction, and in New York as a Court of ancillary jurisdiction. It then alleges that it is the intention of plaintiff to shortly declare the principal due, and obtain a decree of foreclosure and sale, and avers that the amount realized will probably be less than the face of the bonds.

The dependent bill then avers:

"That by reason of the uncertainty as hereinbefore set forth as to the amount of earnings of the Western Pacific Company from time to time heretofore or hereafter applicable to said sinking fund payments or hereafter to said

interest installments, your orator is not informed as to the exact amount for which the defendant the New Denver Company is liable under the terms of said Contract B, in respect either of payments due from time to time to the said sinking fund or for said installments of interest or by reason of the breach of said contract as a whole; that the true amount thus due and the true amount of such liability can appear only upon an accounting to be had under the direction of this Honorable Court ascertaining the amount of such earnings so applicable and the amount of deficiency therein for which the defendant the New Denver Company is liable as aforesaid; and that also, in view and because of the various defaults of the New Denver Company, hereinbefore set forth, that Company is liable to your orator for a total or gross sum in liquidation of its total future liability under said Contract B and also under the said guaranties, but such total or gross sum can only be ascertained and fixed by an accounting and adjudication by this Honorable Court proceeding in due course upon equitable principles. That your orator is informed and believes that *adverse claims in respect of the amount earned and the amount due are made by the defendant the Western Pacific Company and the defendant the New Denver Company, which can be resolved and determined only on such an accounting as aforesaid, to which both of the said companies shall be parties*, and that the defend-

ant the New Denver Company is liable herein for the amount of the deficiency appearing upon such an accounting in respect of the said sinking fund payments, of the said interest payments, and the amount fixed in respect to the future liability of said defendant."

The prayer is:

1. To determine the meaning of "Contract B" as to sinking fund;
2. For an accounting against the Western Pacific;
3. For a determination of the amount which will remain due after the foreclosure sale;
4. For a determination of the meaning of "Contract B" as to that instrument constituting a lien;
5. For a receiver of the Denver and Rio Grande, and the application of its property to the lien of "Contract B".
6. For an injunction against the fictitious defendants.

When the receivers learned of the filing of this dependent action, they presented to this Court a petition for instructions as to whether or not *they* should begin a suit on "Contract B". At the hearing, Mr. How, representing the plaintiff, and Mr. Bowie, of Counsel for the "Bondholders' Committee", appeared. After hearing, this Court directed the issuance of a rule to show cause why the plain-

tiff should not be restrained from proceeding further with the dependent action in New York.

At the hearing, the plaintiff presented its answer, in which it challenged the jurisdiction of this Court to issue an injunction; alleges that it is the only person capable of enforcing "Contract B"; sets up that an injunction would be a violation of the "due process amendment to the Constitution"; alleges that the receivers "or one of them", seek to litigate in this Court questions properly cognizable in New York; that the Denver and Rio Grande is not subject to the jurisdiction of this Court; that the plaintiff, in so far as "Contract B" is concerned, is not subject to the jurisdiction of this Court; that the dependent bill does not seek to litigate anything cognizable in this Court; that nothing contained in the petition of the receivers for instructions, filed May 18th, sought for instructions in regard to "Contract B"; that nothing contained in the dependent bill can affect the relations between the Western Pacific and the Denver and Rio Grande.

The plaintiff also presented the affidavit of Alvin W. Krech, President of The Equitable Trust Company of New York. That affidavit states that "Contract B" was specifically and separately mentioned in and is subject to the terms and provisions of the First Mortgage; sets out quite fully the provisions of the First Mortgage and of "Contract B", or rather the conclusions of affiant as to the provisions of those instruments; it states that "Contract B" was not submitted to this Court in the bill to fore-

close. Affiant states that of the outstanding bonds, the sum of \$36,812,000 bears stamped upon them the independent guarantee of the Denver and Rio Grande, and that there are approximately \$13,188,000 which do not bear the stamp guarantee. Affiant sets out that all of the bonds were sold in the year 1905 to a syndicate, and that in May, 1908, an agreement was entered into between the Denver and Rio Grande and this syndicate for the consolidation of the Denver and Rio Grande and the Rio Grande Western into a new corporation, and the issuance by the new corporation of First and Refunding Mortgage Bonds upon practically all of the property and assets of the Denver and Rio Grande. This syndicate agreed to purchase \$10,000,000 face value of the Denver Company's convertible notes, which were secured by a deposit of \$22,500,000 principal amount of the First and Refunding Mortgage Bonds. That the immediate purpose of this agreement was to raise money to be employed by the Denver Company in completing the work of constructing the main line of the Western Pacific. That these funds up to the sum of \$18,750,000, were to be turned over by the Western Pacific in payment for \$25,000,000 face value of the Western Pacific Second Mortgage Bonds.

That as a part of the consideration of this arrangement with the Syndicate, the Denver and Rio Grande agreed to stamp on the Western Pacific First Mortgage Bonds an unconditional guarantee for the punc-

tual payment of the interest; that the Syndicate purchased said convertible notes, which were subsequently paid. Large amounts of the First and Refunding Bonds of the Denver and Rio Grande were sold and the proceeds turned over to the Western Pacific.

That certain bondholders of the Western Pacific formed a Bondholders' Committee, and that there has been deposited with this Committee bonds of the Western Pacific of the par value of \$26,055,700. That additional bonds of approximately \$700,000 have been promised for deposit by bondholders.

That the dependent suit in New York was started before the plaintiff or its New York counsel had any knowledge whatsoever of the petition of the receivers of May 18th.

That three suits have been brought by individuals upon the stamp guaranties in the Courts of New York, one for \$1250, one for \$250 and one for \$225. Copies of the New York proceedings and the contract between the bondholders and the Bondholders' Committee are attached to this affidavit.

The plaintiff also presents the affidavit of F. W. M. Cutcheon, one of the attorneys for the Bondholders' Protective Committee. The names of the Committee are set out in the affidavit. This Protective Committee was organized informally some days prior to May 1st, 1915.

That this Committee has entered into a certain agreement which is attached to the affidavit. That

shortly after May 1, 1915, a circular letter was issued to the bondholders inviting them to deposit their bonds with the Committee.

That there is another committee organized in Holland of bondholders in that country, and that that committee is to co-operate with the American committee. That the members of the Committee, or their families, or firms with which they are connected, represent \$8,600,000 of the First Mortgage Bonds.

That the Bondholders' Committee adopted a resolution requesting the plaintiff to bring suit against the Denver and Rio Grande Railroad Company, providing that nothing should be included in or omitted from the suit which would affect the right of the Western Pacific First Mortgage Bondholders to assert a legal or equitable lien upon the assets of the Denver and Rio Grande.

That the purpose of the Committee in approving the said bill was, first, to preserve the rights of the bondholders of those bonds which are unstamped; second, that it was the wish of the bondholders; third, that the Denver and Rio Grande should not be forced into the hands of receivers by judgments obtained by individual bondholders; and fourth, that as a result of possible negotiations between the Denver and Rio Grande and the Committee, its surplus earnings might be applied to the payment of the interest.

That the Denver and Rio Grande has always made net earnings in excess of the amount necessary to pay

the interest on its own bonded debt. That the Denver and Rio Grande will be enabled, with the earnings of the Western Pacific, to pay the interest on the Western Pacific Bonds.

That the Denver and Rio Grande has large Treasury bonds which can be sold and the amount applied to the payment of the interest of the Western Pacific Bonds.

That the Denver and Rio Grande has upon deposit, under its Adjustment Mortgage, as security for \$10,000,000 Adjustment Bonds, the sum of \$7,000,000 First and Refunding Mortgage Bonds. That the First and Refunding Mortgage Bonds have a market value of \$470 per bond. That default has occurred under the Adjustment Mortgage above referred to, and that if judgments are obtained on the guaranty of the Western Pacific Bonds, that the Adjustment bondholders of the Denver and Rio Grande will take steps to throw it into the hands of receivers.

That the obligations of the Denver and Rio Grande, in addition to its obligation on the Western Pacific Bonds, amount to secured obligations in the sum of \$124,000,000. That of this \$124,000,000, \$42,000,000 is for obligations created since the obligation to pay the interest on the First Mortgage Bonds of the Western Pacific. That if it should be necessary to re-organize the Denver and Rio Grande, it would be necessary to raise the sum of about \$25,000,000 for betterments.

This affidavit concludes with a resolution of the Bondholders' Protective Committee calling upon this Court not to enjoin the plaintiff from prosecuting the dependent action.

The petition of the Receivers of the 19th of May, and the affidavit of Counsel for Receivers, both used on this hearing, show the following documents:

1. An agreement of the Denver and Rio Grande and the Rio Grande Western with the Western Pacific, by which the former companies agree to execute contracts A, B and C, in such form that they can be pledged under the First Mortgage.

2. Contract "A", which provides that the Denver and Rio Grande shall purchase \$25,000,000 of second mortgage bonds at 75%.

3. Contract "B".

4. Contract "C", providing for traffic arrangements with the Missouri Pacific.

NOTE: Contracts "A", "B" and "C" were pledged under the First Mortgage.

5. The First Mortgage, or Deed of Trust.

6. The Second Mortgage, or Deed of Trust.

7. The lease from the Denver and Rio Grande to the Western Pacific of freight terminals in Salt Lake City.

8. The lease from the Denver and Rio Grande to the Western Pacific of passenger equipment.

9. The modification of the passenger* equipment lease.

10. An agreement between the Denver and Rio Grande, the Western Pacific, the Salt Lake Union Depot and Railroad Company, and the Bankers' Trust Company for the joint use of the Union Passenger Depot in Salt Lake.

11. The first Mortgage, or Deed of Trust of the Salt Lake Union Depot and Railroad Company.

NOTE. The agreement for joint use of the union depot by the two railroads is pledged under this mortgage, to secure the bonds of the Union Depot Company.

12. An amendment to this latter deed of trust, to which the bondholders were parties.

13. An agreement between the Denver and Rio Grande and the Western Pacific, by which the Union Depot Company was to acquire certain lands.

14. An agreement with the Denver and Rio Grande for the division of the stock of the Salt Lake Depot Company.

15. An agreement with the Denver and Rio Grande, providing the manner in which advancements shall be charged on the books of the Western Pacific, and providing that the Western Pacific shall never be called upon for reimbursements until its earnings shall justify such payment.

16. An agreement between the Denver and Rio Grande, the Western Pacific, and Bowling Green

Trust Company, for the deposit of certain Western Pacific Second Mortgage Bonds, as security for moneys to be advanced in *pro tanto* fulfillment of Contracts "A" and "B".

17. An agreement of the Denver and Rio Grande, the Western Pacific, and the Equitable Trust Company, by which certain of the second mortgage bonds are to be taken, and pledged under the Denver's Refunding Mortgage, and the proceeds expended in *pro tanto* fulfillment of Contracts "A" and "B".

18. An agreement between the Western Pacific and the Utah Fuel Company for the advancement of one semi-annual interest payment on the First Mortgage Bonds.

19. An agreement between the Denver and Rio Grande and the Utah Fuel Company, whereby the Denver and Rio Grande agrees to cause the capital stock of the Western Pacific to be increased after July 1, 1915, to an amount sufficient to cover the indebtedness created by the last mentioned contract.

20. The 7% Adjustment Mortgage of the Denver and Rio Grande.

I.

The receivers represent all the parties interested in the property—plaintiff, defendant, stockholders, bondholders, and unsecured creditors—and the rights of action which any of them had are vested in the receivers.

In *McLeod vs. City of New Albany*, 66 Fed. 378, the Court of Appeals of the Seventh Circuit says:

"The other parties, whose presence is suggested as essential, are parties to the original bill, as holding incumbrances upon the property subordinate to the lien of the complainant. They were in court in the suit in which the receivers were appointed, and were bound to take notice of the intervening petition of the city filed in that suit, and of the proceedings thereunder. It was not necessary that they should be made formal parties to the petition. Being parties to the suit, they were in fact parties to the intervening petition. The receivers, in respect to the conservation of the property, represent all parties to the original bill. It was their duty to preserve the estate, and thereto to pay taxes thereon. If the taxes were illegally laid, it was their duty, representing all in interest, to contest payment. If parties to the original bill desired to take active part in the contest, they had the right to be heard, and such right, if demanded, would doubtless have been accorded to them. They did not so ask, although, being parties to the suit, they were obligated to take notice of the proceedings. They are not here objecting that they were not well represented by the receivers. The latter cannot for the first time, after full hearing upon the merits before the master, ob-

ject that those they represented should be formally notified of the petition."

The following language, from *Henning vs. Raymond*, 35 Minn. 303, 29 N. W. 132, is fully borne out by the principles of modern practice:

"The receiver is appointed for the benefit of all concerned. He is the representative of the court, and of all parties interested in the litigation wherein he is appointed. He is the right arm of the court in exercising the jurisdiction invoked in such cases of administering the property. The court can only administer and dispose of it through a receiver. For this reason, all suits to collect or obtain possession of the property must be prosecuted by the receiver, and the proceeds received and controlled by him alone. If the suit be nominally prosecuted in the name of the original owners of the property, it is an inconvenient, as well as useless, form; for they have no discretion as to instituting the suit, and no control over its management, and no right to the possession of the proceeds. The receiver, as an officer of the court which has taken control of the property, is, for the time being, and for the purpose of the administration of the assets, the real party in interest in the litigation. There is no reason therefore, why the suit should not be instituted in his own name. Hence, in many states, it is so provided by statute. But in many jurisdictions, in the absence of any such statute, it

has been held that the courts may,* by virtue of their inherent equity powers, authorize their receivers to institute suits in their own names.

Davis vs. Gray, 16 Wall. 203;
Harwick vs. Hook, 8 Ga. 354;
Leonard vs. Storrs, 31 Ala. 488;
Wray vs. Jamison, 10 Humph. 186;
Tillinghast vs. Champlin, 4 R. I. 173."

The doctrine is laid down in the most modern work, Alderson on Receivers, Section 4, as follows:

"A court, by appointing a receiver, takes the subject-matter of the litigation out of the control of the parties and into its own hands, and holds it pending the proceeding and until the final disposal of all questions, legal or equitable, involved in the action. Since the receiver's possession is that of the court appointing him, any attempt to disturb it without leave of the court is a contempt of court, and may be punished accordingly."

The language of the Supreme Court of Indiana, in *American Trust and Savings Bank vs. McGettigan*, 152 Ind. 582, 52 N. E. 793, 71 Am. St. Rep. 345, is a good statement of the recognized principles:

"It is well established that when a court takes possession of the property of an insolvent corporation, and appoints a receiver, such receiver 'is the arm of the court', by which it administers

the trust for the benefit of the creditors. But the court receives such property impressed with all existing rights and equities of creditors, and the relative rank of claims, and the standing of liens remains unaffected by a receivership. Every legal and equitable lien upon the property of the corporation is preserved, with the power of enforcing it:

Gluck and Becker on Receivers, Sec. 6;

Am. & Eng. Ency. of Law, 407;

Woerishoffer vs. North River etc. Co., 99 N. Y. 398-402;

Hubbard vs. Hamilton Bank, 7 Met. 340;

Minchin vs. Second Nat. Bank, 36 N. J. Eq. 436;

Snow vs. Winslow, 54 Iowa 200;

Hale vs. Frost, 99 U. S. 389.

And it is as much the duty of a receiver, in administering an estate, to protect valid preferences and priorities as it is to make a just distribution among the general creditors. He is strictly the officer of the court, and it is his duty so to conduct the business that the interests of all persons shall be protected. Between them he is indifferent, owing a like duty to all, and for that reason should, as far as possible, see to it that each has an equal opportunity to enforce his claim;

Gluck and Becker on Receivers, Secs. 28, 48;
First Nat. Bank etc. vs. Barnum etc. Works,
 58 Mich. 315, 317;
Attorney General vs. Security Life Ins. Co.,
 79 N. Y. 267, 271.

It is true, as asserted by counsel for appellants, that the right of the receiver to bring this action depends upon the right of the creditors represented by him to have united in bringing it, if no receiver had been appointed. The complaint and argument by appellee proceed upon the assumption that the appellee, in bringing it, was acting on behalf of all the creditors to set aside a fraudulent mortgage. In him all the creditors unite."

The case of *Cushing vs. Perot*, 175 Pa. St. 66, was an action by an individual creditor of an insolvent corporation to recover on stockholders' liability. The corporation was in the hands of a receiver. The Court held that the creditor could not maintain the action, but that the suit must be brought by the receiver, quoting from *Patterson vs. Stewart*, 44 Minn. 84, to the effect that: "Everything becomes assets in his hands which was assets as to creditors, as well as what was assets to the corporation."

The Pennsylvania Supreme Court further says:

"A receiver represents, not only the corporation, but all its creditors; and, as to the latter, it is his duty to secure all the assets available

for their payment. For this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone. As each creditor may sue, the right is equal in all, and common to all; and hence the receiver, who represents all alike, is the proper party to assert the common right and pursue the common remedy for the common benefit."

The same principles have been affirmed in California, in *Pacific Ry. Co. vs. Wade*, 91 Cal. 449, 25 Am. St. Rep. 201, where the Supreme Court say:

"The property of the cable company is in *custodia legis*. The receiver is indifferent between the parties. His possession is the possession of the court, for the benefit of all persons interested, whether named as parties in the action or not, and it cannot be disturbed without the consent of the court. No one claiming a right paramount to that of the receiver can assert it in any action without the permission of the court. No sale can take place, no debt can be paid, no contract can be made, which does not receive the sanction of the court. The receiver, with permission of the court, can do anything the corporation might have done to make the most out of the assets in his hands. It has been held that in a proper case he may settle disputed claims, and compromise with

debtors of the corporation; he may lease other lines of railways, and operate them; he may complete the construction of unfinished lines of railroad, and negotiate loans for the payment of the cost thereof; he may enter into contracts by the terms of which the owners of other roads may use the road under his control at given rates; and he may change the rates agreed upon prior to his appointment, between the company he represents and another railroad corporation:

Code Civ. Proc., Sec. 568;

Beach on Receivers, Secs. 268, 335, 360, 406;

Gluck and Beckers on Receivers, 106, 107,
131, 140, 241;

In re New Jersey etc. Ry. Co., 29 N. J.
Eq. 67;

Wiswall vs. Sampson, 14 How. 65;

Gibert vs. Washington etc. R. R. Co., 33
Gratt. 685."

Lord Hargreave, in the Matter of Butler's Estate,
13 Br. Ch. (N. S.) 456, says:

"The general proposition is, that the possession of the receiver is that all the parties to the suit, according to their titles. So between the owner and incumbrancers, it for some purposes the possession of the incumbrancers, who have obtained or extended the receiver; as between the owner who has been displaced and a third party, it is the possession of the former.

The receiver is, in fact, his agent; all the rents are applied to his use, either by paying his debts or paramount charges, or by being handed over to him."

And, in foreclosures, at least, it has long been established law that the possession of a receiver is that of the party who is ultimately successful in the litigation and that his title will relate back to the appointment.

Angel vs. Smith, 9 Ves. 335.

And in *Union Banks vs. Kansas City Bank*, 136 U. S. 223, it is said that the effect of the appointment of a receiver is "to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately entitled."

In accordance with the principles laid down by these authorities, it would seem clear that the provision of the Deed of Trust, that the financial provisions of Contract "B" shall not pass to a purchaser, do not affect the problem in the least as to the ultimate title or disposition of a portion of the property *after foreclosure*. Accordingly, this Court, in its decree *nisi*, will direct what is to be done with that part of Contract "B", just as it will direct the disposition of the physical property, or Contracts "A" and "C", or the stocks of the Standard Realty Company, or anything else which is pledged under the mortgage as security for the bonds.

Now, a mere trustee has no right to withhold

any property from the receiver. The leading case on that subject (*Miles vs. New South Building and Loan Association*, 95 Fed. 919), lays down clearly the procedure as follows:

"The receiver in this case has authority to make the collection if he is placed in possession of the notes and mortgages. It is true that the assets in the possession of the Company are in part held to secure bonds issued by the defendant corporation, and that these securities cannot lawfully be delivered from that purpose. The securities must be held for the purposes for which they were deposited, and no order will be made to appropriate them to other purposes. The proceeds of the collection by the receiver of these claims will be held as a separate fund, subject to the same trusts that were impressed on the claims by the contracts under which they were held by the company. The company will not only be protected by the order of the court to surrender the assets, but will also be protected by subsequent orders applying the funds arising from the claims in strict conformity to the trusts under which the claims have been held by the company.

"Whether or not the Company is a necessary party defendant to the bill is a question not necessary to be now decided. If it is, and is not made a party, it would be permitted to intervene in the cause by petition, if it became necessary to do so to protect or assert any interest involved in the suit."

III.

When the Equitable Trust Company filed this suit, and receivers were appointed, all of the mortgaged and pledged property passed into the hands of this Court, and the receivers are as much entitled to the possession of Contract "B" as of any other property. Therefore, the injunction should be issued for two reasons: (1) The suit in New York is an attempt to interfere with property constructively in *gremio legis*; (2) The adjudication of the meaning of Contract "B", and its enforcement, have been submitted to this Court.

(1) We take the following propositions to be well settled:

(a) That a receiver is entitled to the possession of *choses in action* pledged to another, when that other merely holds them as security for the creditors of the defendant, or for any specified class of such creditors, and has no beneficial interest in himself.

For instance: in *Miles vs. New South Building & Loan Association*, 95 Fed. 919, certain notes and mortgages were in the possession of The American Trust & Banking Company. They had been delivered to this latter Company to secure bonds of the defendant corporation. The receiver demanded possession, and upon refusal to deliver, made a motion for an order directing that they be given up to him.

The Court says:

"The defense is made that the court has no jurisdiction to proceed in this summary way,

but that a formal suit should be brought to recover the assets, and that on the facts the Company is entitled to retain the possession of the assets. It is stated in *Parker vs. Browning*, 8 Paige 388, that, 'if the property is in the possession of a third person, who claims the right to retain it, the receiver must either proceed by suit in the ordinary way to try his right to it, or the complainant shall make such third person a party to the suit, and apply to have the receivership extended to the property in his hands.' This case is often quoted approvingly, but usually with an emphasis in the context on the limiting words that the third person, to make the formal suit necessary, should be one who 'claims the right to retain the property'. This claim of the right to retain it does not mean a bare refusal to surrender it. It means the ascertain of some right or interest in the property; not a mere possession or a holding of the property for others who are parties to the suit, or whose rights are protected by the suit. The practice of requiring the surrender of property to the receiver by summary motion or petition is well recognized where it is held by the attorneys, agents, and employes of the defendant. Beach, Rec. 230. The same practice seems not improper where the property in question is held by a defendant in the motion, not for himself, but as trustee, and so, in a sense, as the agent, for those interested in the assets including the defendant in the case. In modern

litigation in equity a defendant's property may be in the possession of hundreds of agents and bailees, holding under various agreements, and it is not reasonable that a receiver appointed of all of the assets should be required to sue each bailee and agent separately, or that all should be made parties to the main suit, should they merely refuse to surrender the assets. When a receiver is appointed for a corporation doing business by agents in many states, to make the appointment serve its purpose the court should have jurisdiction to require a surrender of the property to the receiver. The order in such cases requiring the delivery of the property to the receiver does not affect the title to the property, nor even the right of possession. It only places the assets in the custody of the officer of the court, who holds them for those ultimately shown to be entitled to them. *Union Bank vs, Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013. The decision of the motion affects no beneficial interest in the property. When the motion is disallowed, it is not a thing adjudged as to the ownership of the property against the receiver; nor is the granting of the motion conclusive against the defendant in the motion as to any title or interest in the property. In the former case the receiver could bring a formal suit, and in the latter the defendant in the action could sue the receiver, or intervene in the litigation. This summary proceeding is not opposed to the constitutional provision that no one

shall be deprived of his property without due course of law, because the receiver does not become vested with any beneficial title to the property. Beach Rec. 209, 230; *Brandt vs. Allen* (Iowa) 40 N. W. 82. In litigations involving the receiverships and settlements of insolvent corporations it is desirable that the procedure be concentrated in one cause, so far as practicable. In *White vs. Ewing*, 159 U. S. 46, 15 Sup. Ct. 1018, it was held, in a suit to distribute the assets of an insolvent corporation, that an ancillary suit or ancillary suits might be brought in the same case by the receiver against 130 persons who were indebted to the corporation. There seems to be no good reason why persons in possession of the assets of the corporation cannot be brought before the court by summary petition, and, if they admit the possession, and show no beneficial claim or title in themselves, be required to surrender such assets to the receiver. The Company claims no ownership in the assets. Its claim is as trustee for others. The main suit is to settle an insolvent corporation, and the rights of all of the beneficiaries in the trust represented by the Company can be fully protected by the Court in the case in which the receiver was appointed."

This case was quoted with approval in *Morrill vs. American Reserve Bond Co.*, 151 Fed. 305. In that case, under the laws of Missouri, large amounts of mortgages had been deposited with the State Treas-

urer, as security for the bonds issued by the defendant. The Circuit Court, by Judges Sanborn and Hook, held that the receiver was entitled to them, even as against the State statute. The Court quotes with approval the language of *Illinois Steel Co. vs. Putnam*, 68 Fed. 515, 15 C. C. A. 556, as follows:

"Where a bill in equity brings under the direct control of the court all the property and estate of the defendants, or of certain named defendants, or certain designated property of all or of either of the defendants, to be administered for the benefit of all entitled to share in the fruits of the litigation, and the possession and control of the property are necessary to the exercise of the jurisdiction of the court, the filing of the bill and service of process is an equitable levy on the property, and pending the proceedings such property may properly be held in *gremio legis*. The actual seizure of the property is not necessary to produce this effect, where the possession of the property is necessary to the granting of the relief sought."

The principle of these cases is further upheld in *Robinson vs. Mutual Reserve, etc., Co.*, 162 Fed. 800.

IV.

Even if it be conceded that the plaintiff has a right of action, that action at this time is an interference with the property in the hands of the receivers, because the amount of the recovery depends: (1) Upon the earnings of the Western

Pacific property, and (2) The amount which may be realized from the sale of that property.

1. The *primary* financial obligation of the Denver and Rio Grande is to purchase semi-annually the promissory notes of the Western Pacific to the amount "by which the gross earnings and income of the Western Pacific during the preceding fiscal half year shall be insufficient to meet the sum" of operating expenses, taxes, interest on the First Mortgage Bonds, sinking fund, any other sum which may be necessary to assure the continued and efficient operation of the property, tax on the bonds, and interest on any indebtedness other than said First Mortgage bonds. (Article II, Section 3, Subdivision a.)

2. The Denver and Rio Grande *and the Western Pacific jointly and severally* agree to pay to the Trustee, *out of the purchase price of the notes*, an amount equal to the difference between the sum actually appropriated by the Western Pacific "out of its earnings and other income," and the amount of the interest. (Article II, Section 3, Subdivision b.)

3. The Denver and Rio Grande agrees to pay *to the Western Pacific*, each half year, an amount sufficient to make up any deficiency in earnings for operating expenses, taxes, any other charge necessary to insure its continuous and efficient operation, taxes on bonds, and interest on any other debt. (Article II, Section 3, Subdivision c.)

4. The Denver and Rio Grande promises to pay to the Trustee sufficient money, "with the amounts then already paid by the Pacific Company to its fiscal agents," to make up the interest and sinking fund. (Article II, Section 3, Subdivision d.)

5. The Denver and Rio Grande agrees that if the Western Pacific is for any reason unable to deliver the promissory notes, the money, *non obstante*, shall be paid; but the Denver and Rio Grande shall not thereby waive the right to enforce the delivery of the notes. (Article II, Section 3, Subdivision e.)

6. The Denver and Rio Grande agrees that if at any time the Western Pacific is unable to issue the promissory notes, by reason of the fact that the issued capital stock of the Western Pacific is insufficient to warrant it, then the Denver and Rio Grande will subscribe for enough new stock to satisfy the law. (Article II, Section 3, Subdivision f.)

7. The Western Pacific agrees that it will execute the notes for any advancements made by the Denver and Rio Grande, and if for any reason it is impossible to issue them at the time of such advancements, it will take such corporate action as may be necessary to give validity to the notes. (Article III, Section 4.)

8. The Western Pacific agrees to "faithfully apply all its gross earnings and income, as the same shall accrue, to the following purposes and in the following order of priority":

(1) Operating expense.

- (2) Taxes.
- (3) Interest on First Mortgage Bonds.
- (4) Sinking Fund.
- (5) Any other charge necessary to assure the continued and efficient operation of the property.
- (6) Taxes on the bonds.
- (7) Interest on any other indebtedness.
- (8) To the payment of the promissory notes of the Denver and Rio Grande.
- (Article III, Section 5.)

9. The Western Pacific agrees that whenever it earns a surplus above the matters specified in the first seven subdivisions of the last paragraph, then the Denver and Rio Grande shall retain all traffic balances, and apply them *pro tanto* on the promissory notes. (Article III, Section 7.)

It seems perfectly clear that *all* of these provisions are mutually dependent. It is, of course, a cardinal rule in the interpretation of contracts, that the intention is to be gathered, not from detached portions of the contract, but from the whole of it.

8 *Cyc*, 579 (and authorities cited).

So, taking Contract "B" as a whole, the meaning is clear that it creates a double obligation:

- (a) On the part of the Western Pacific to apply all earnings over operation to interest and taxes.

- (b) On the part of the Denver and Rio Grande to make up the deficiency.

Now, it is evident that any money advanced by the Denver and Rio Grande to make up this deficiency, constitutes a debt in its favor against the Western Pacific, which the latter corporation agrees to evidence by its promissory notes. It is equally evident that, taking the contract as a whole, the true measure of the Denver and Rio Grande's liability is the difference between the Western Pacific surplus earnings and the amount of the interest and sinking fund. Accordingly, in the dependent suit, the Denver and Rio Grande has the right to compel the application of those surplus earnings to a reduction of its liability. Now, it is quite apparent that the earnings of the Western Pacific are in the hands of the receivers, and the disposition of those earnings is a matter purely for this Court. It would seem to follow, inevitably, that any action, the determination of which depends upon the disposition of those earnings, is an interference with property in the hands of the receivers, and with a matter which is submitted to this Court by the filing of the Bill.

In this connection, it should not be forgotten that the Deed of Trust specifically provides that surplus earnings are subject to the mortgage, and are applicable to the payment of the interest, pending receivership.

(*Deed of Trust*, Article V., Section 5.)

Now, if the bondholders are entitled to have the net earnings of the Western Pacific during the receivership applied to this interest, it would seem apparent that the liability of the Denver and Rio Grande is dependent directly upon the amount of those earnings which is legally applicable to the interest. In other words, before the *amount* of the Denver's liability can be fixed for current interest, this Court must determine how much of the money in the hands of the receivers shall be applied to the payment of interest. And it is equally certain that that amount depends upon many things necessarily within the purview and direction of this Court—such, for instance, as preferential claims, necessary betterments, expenses of the suit and the receivership—besides the contingencies arising from the conduct of the business itself.

Moreover, the dependent bill asks for an interpretation of Contract "B". If the New York Court should determine that the true meaning of Contract "B" is that the bondholders, or the Trustee, are entitled to the earnings of the Western Pacific, before the Denver is compellable to pay anything, that would be an adjudication directly upon property in the custody of this Court.

Now, it is thoroughly well settled, that if a receiver pays out money, even by the judgment or order of a court other than one appointing him, it will not be allowed, but will be surcharged of his account.

In *De Winton vs. Mayor of Brecon*, 28 Beav. 200, Lord Romilly says: "It is always to be remembered that the receiver in this case would never have got a penny except by the order of the Court enabling him to receive it, and entitling him to receive it, and entitling him to give a good discharge to the person who paid it; and, consequently, it is strictly money belonging to the Court of Chancery, and the receiver can only discharge himself by paying it in obedience to the direction and order of *that court*."

2. So far as the *future* liability of the Denver and Rio Grande is concerned, while the Deed of Trust is not free from ambiguity, still it is clear: (a) That its liability is not determinable at this time, and (b) it is dependent upon the amount realized from the sale of the property in the foreclosure suit.

The avowed purpose of the Bill in this case is to secure a sale of the property of the Western Pacific. That sale may realize \$50,000,000 and interest, or it may result in a less sum. If it brings the full value of the bonds, then, of course, there is no liability. If it brings less, then the deficiency is the measure of that liability. In either event, however, the liability is dependent upon the result of the outcome of the action in this case, and the liability is contingent, until this case is determined.

To put it differently, the primary fund for the payment of the principal of the bonds is the property of the Western Pacific; the *primary fund* for the payment of the interest is the surplus earnings of

the Western Pacific; and to say that any action which depends for its result upon the action of this Court upon those two primary funds, is not an interference with those funds, is simply to trifle with language.

Thus, in *Pennsylvania Steel Co. vs. New York City Ry. Co.*, 198 Fed. 750, the Metropolitan Company had guaranteed the bonds of the Second Avenue Company. The bondholders of the latter company presented their claim to the receiver of the former, and they were disallowed by the Master, for the reason that the claim was contingent upon the outcome of the foreclosure sale. The Circuit Court of Appeals for the Second Circuit say:

“Assuming, however, that the bondholders may base their demand upon the assumption clause, still it does not carry us far. It appears from the authorities that such a covenant, even if absolute in form, will be treated as conditional. Thus in *Farmers’ Loan, etc., Co. vs. Central Park, etc., R. Co.*, 193 Fed. 963, this court said in respect of an assumption provision in a lease also identical with the present one:

‘But even assuming with appellant that the lease of 1892 does contain an assumption of the Central Park Company’s funded debt and assuming further, that this case is governed wholly by the law of New York as declared by its highest court, there is nothing in the evidence to show that the Metropolitan Company ever assumed any higher obligation than

one to hold the Central Park Company harmless from the consequence of foreclosure, the pledged property remaining always the primary fund for the payment of the mortgage. "The giving of a covenant by the grantee does not work a novation of the mortgage debt. It does not make the debt his own, except in respect to the estate." *Matter of Wilbur vs. Warren*, 104 N. Y. 198, (10 N. E. 263), citing *Butler vs. Butler*, 5 Ves. 534.

If, then, the mortgaged property be the primary fund for the payment of the mortgage, it necessarily follows that this assumption covenant, if constituting a promise for the benefit of the mortgage bondholders, was merely a promise to pay any deficiency after exhausting the mortgage security. Granting that the promise would be for the benefit of the bondholders and that it would support a direct action by them, would not change its conditional character. The Metropolitan Company was liable to the bondholders only as it was liable to the Second Avenue Company itself. *Vrooman vs. Turner*, 69 N. Y. 280; 25 Am. Rep. 195.

And if the bondholders had a conditional right of action upon the assumption clause, i. e., if they could after exhausting the security of the mortgage, their demand was too uncertain when presented—and is too uncertain now—to constitute a provable claim in an equity receivership.

cause within the principles stated in the Express Company's Appeal. As shown in the statement of facts, no foreclosure decree has ever been entered and there is nothing to show that there ever will be any deficiency after using up the mortgage security. Assuming the assumption covenant to be enforceable, it is entirely uncertain what, if anything will ever be due upon it."

V.

The res, of which this Court has acquired jurisdiction by the filing of the bill, is the whole subject matter of the deed of trust, and is not confined to the physical property.

It seems to be settled law, that that Court, which first acquires jurisdiction of the subject matter of a suit, will retain it for the decision of all matters connected with that suit, or necessary to a complete determination of it. It is equally well settled, that this court of primary jurisdiction will enjoin either of the parties from proceeding in any other jurisdiction to try any of the questions connected with the controversy. Much of the argument in this case has proceeded upon the theory that the question at issue is whether or not the *proceeds* of claims against the Denver and Rio Grande are involved in the foreclosure, and whether or not the so-called *financial* part of the agreement will pass to a purchaser. But the rule is by no means so narrow in its scope. Thus, in *Farmers' Loan and Trust Co. vs. Lake Street Elevated Railroad Co.*, 177 U. S. 51, an action had been brought in the Federal Court

to foreclose a mortgage. The Railroad commenced an action in the State Court, alleging that the Trust Company was incapacitated, by reason of its failure to comply with State statutes, and asking that it be removed as Trustee, and enjoined from foreclosing. The State courts held with the Railroad; but on Writ of Error, the Supreme Court of the United States reversed the Supreme Court of Illinois, saying:

“The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.

Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation the court may be compelled to assume the possession and control of the property to be affected. The rule has been

declared to be of especial importance in its application to Federal and state courts.

Peck vs. Jenness, 7 How., 612, 12 L. Ed. 841;

Freeman vs. Howe, 24 How. 450, 16 L. Ed. 749;

Moran vs. Sturges, 154 U. S. 256, 38 L. Ed. 981, 14, Sup. Ct. Rep. 1019;

Central National Bank vs. Stevens, 169 U. S. 432, 42 L. Ed., 807, 18 Sup. Ct. Rep., 403;

Harkrader vs. Wadley, 172 U. S. 148, 43 L. Ed., 399, 19 Sup. Ct. Rep. 119.

We think that this salutary rule is applicable to the present case. The bill filed in the Federal Court looked to the enforcement of the trusts declared in the mortgage, the control of the railroad through a receiver, the sale of the railroad, and the final distribution of the assets of the company. Such a proceeding necessarily involves the right of the complainant trustee to act as such, and the determination of the controversy in respect to the ownership of the bonds and to the power of a majority of the bondholders, by an agreement with the stockholders, to dispense with an enforcement of the provisions of the mortgage by judicial proceedings. These questions are not for our consideration, unless and until they are brought before us on

appeal from a final decree of the court whose jurisdiction was first legally invoked to determine them."

In *Freeman vs. Howe*, 24 How. 450, the Supreme Court quotes the following language from *Peck vs. Jenness*, 7 How. 624:

"It is a doctrine of law too long established to require citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court."

In *Starr vs. Chicago, etc., Ry. Co.*, 110 Fed., 3, the Circuit Court had determined that a statute fixing maximum freight rates was unconstitutional. The Attorney General brought an action for the recovery of penalties under the Act. Judge Sanborn laid down the following principles:

1. The Federal courts must determine for themselves the limit of their jurisdiction, and the Supreme Court of the United States is the final arbiter in all questions of this nature. A renunciation of this power or a failure to discharge this duty would be fatal to our system

of government. It would withdraw the keystone of the arch.

U. S. vs. Peters, 5 Cranch, 115, 3 L. Ed., 53;

Freeman vs. Howe, 24 How., 450, 459, 460, 16 L. Ed. 749;

"2. Wherever a federal court and a state court have concurrent jurisdiction, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted. This rule applies equally to civil and criminal proceedings.

Harkrader vs. Wadley, 172 U. S., 148, 164, 19 Sup. Ct. Rep. 119, 43 L. Ed., 399;

Sharon vs. Terry, (C. C.), 36 Fed. 337;
Wallace vs. McConnell, 13 Pet. 135, 10 L. Ed., 95;

Clark vs. Five Hundred and Five Thousand Feet of Lumber, 65 Fed., 226, 12 C. C. A. 628, 24 U. S. App., 509;

Gates vs. Buckeye, 12 U. S. App. 69, 4 C. C. A., 116, 53 Fed., 961;

Chittenden vs. Brewster, 2 Wall, 191, 17 L. Ed., 839;

Orton vs. Smith, 18 How., 263, 265, 15 L. Ed. 393;

- Union Trust Co. vs. Rockford R. I. & St. L. R. Co.*, 6 Biss. 197, 24 Fed. Cas. 704 (No. 14,401) ;
- Owens vs. Railroad Co.* (C. C.) 20 Fed., 10;
- Union Mut. Life Ins. Co. vs. University of Chicago*, (C. C.) 6 Fed. 443;
- Freeman vs. Howe*, 24 How. 450, 16 L. Ed. 749;
- Peck vs. Jenness*, 7 How. 612, 622, 825, 12 L. Ed. 841;
- Taylor vs. Carryl*, 20 How. 583, 596, 597, 15 L. Ed. 1028;
- Wisewall vs. Sampson*, 14 How. 52, 14 L. Ed. 322;
- Covell vs. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355, 28 L. Ed. 390;
- Heidritter vs. Oilcloth Co.*, 112 U. S. 294, 302, 5 Sup. Ct. 135, 28 L. Ed. 729;
- Riggs vs. Johnson Co.*, 6 Wall. 166, 196, 18 L. Ed. 768;
- Central Trust Co. of New York vs. South Atlantic & O. R. Co.* (C. C.) 57 Fed. 3.

“3. The foregoing principle is so indispensable to the harmonious working of our systems of federal and state jurisprudence that neither the eleventh amendment to the constitution, nor section 720 of the Revised Statutes, which pro-

hibits the issue by a court of the United States of a writ of injunction to stay proceedings in any court of a state, can be permitted to interfere with its maintenance. The court which first obtains jurisdiction of the subject-matter and of the necessary parties to a suit may, and if it discharges its duty it must, if necessary, issue its injunction to prevent any interference by any one with its effectual determination of the issues, and its administration of the rights and remedies involved in the litigation."

French vs. Hay, 22 Wall. 250, 22 L. Ed. 857;

Dietzsch vs. Huidekoper, 103 U. S. 494, 26 L. Ed. 497;

Moran vs. Sturges, 154 U. S. 256, 14 Sup. Ct. Rep. 1019, 38 L. Ed. 981;

Fisk vs. Railroad Co., 10 Blatchf. 518, Fed. Cas. No. 4830;

Garner vs. Bank, 33 U. S. App. 91, 16 C. C. A. 86, 67 Fed. 833;

Terre Haute & I. R. Co. vs. Peoria & P. U. R. Co. (C. C.) 82 Fed., 943.

This latter case was affirmed by the Supreme Court *sub nomine* in *Prout vs. Starr*, 188 U. S. 537, where it is said:

"The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the

very matters that stood for judgment in the Federal court to the state court by filing a bill in the latter. Such a course might bring about a conflict between those courts, and create the confusion so often deprecated by this court.

Peck vs. Jenness, 7 How. 625, 12 L. Ed. 846;

Chittenden vs. Brewster, 2 Wall. 191, 17 L. Ed. 839;

Orton vs. Smith, 18 How. 263, 15 L. Ed. 393.

The jurisdiction of the circuit court could not be defeated or impaired by the institution by one of the parties of subsequent proceedings, whether civil or criminal, involving the same legal questions in the state court.

Harkrader vs. Wadley, 172 U. S. 148, 166, 43 L. Ed. 399, 405, 19 Sup. Ct. Rep. 119, 126."

In *French vs. Hay*, 22 Wall. 250, the Supreme Court say:

"The court having jurisdiction in *personam* had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory.

Watts vs. Waddle, 6 Pet. 391;

Lewis vs. Darling, 16 How. 1.

Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination and the jurisdiction was exhausted. While the jurisdiction lasted it was exclusive, and could not be trespassed upon by any other tribunal.

Hagan vs. Lucas, 10 Pet. 400;

Taylor vs. Carryl, 20 How. 583 (61 U. S. XVI 1028);

Freeman vs. Howe, 24 How. 450 (65 U. S. XVI 749);

Taylor vs. Taintor, 16 Wall. 370 (83 U. S. XXI 290).

Now, it surely cannot be said that Contract "B" is not part of the property pledged by the Deed of Trust as security for the bonds. This Court has acquired the same right, and it has the same duty, to interpret and enforce the provisions of the Deed of Trust concerning Contract "B," as any other provision of the instrument upon which the suit is based. Accordingly, the construction of that provision of the Deed of Trust, to the effect that Contract "B" shall not be delivered to a purchaser, is before this Court for interpretation and adjudication.

(Deed of Trust, Article V., Section 9.)

That provision is by no means so free from doubt or obscurity as Counsel seem to think. It provides

that as long as the Denver is liable to payments on interest or sinking fund, the Contract shall not be delivered to a purchaser "although such purchaser or purchasers may have succeeded to any or all the interests and rights of the Railway Company thereunder." This provision, as a matter of fact, involves a number of considerations:

1. Does it mean that immediately upon a sale, the bondholders are entitled to a lump sum, which will amount to a capitalization of interest upon the deficiency for the term the bonds still have to run?

2. Does it mean that the Denver will be required to pay full 5% upon the deficiency, or 5% less the earnings of the Western Pacific in the hands of a purchaser?

3. How far is the Denver entitled to insist that a purchaser take the property subject to the burdens of Contract "B"?

4. How far can the bondholders or the Trustee establish Contract "B" as a lien upon the properties of the Denver and Rio Grande?

5. If Contract "B," by virtue of the pledge under the Deed of Trust is a lien upon the properties of the Denver, what is the rank of that lien?

6. Should the funds in the hands of the receivers be applied to interest, and the consequent reduction of the liability of the Denver and Rio Grande?

7. What is the meaning of the provision of the Deed of Trust that the proceeds of a sale shall be applied "to the payment of such principal and interest

without preference or priority of principal over interest or of interest over principal, or of any installment of interest over any other installment of interest, ratably, according to the aggregate of such principal and the accrued and unpaid interest”?

(Deed of Trust, Article V, Section 13.)

8. What is the meaning of the provision of the Deed of Trust that the net income during receivership is primarily pledged and applied to the payment when due, of the interest and principal of said bonds in the order of priority declared in Section 1 of Article Five hereof?

(Deed of Trust, Article IX.)

9. What is the meaning of the provision of the Deed of Trust that the income shall be applied first to the interest, and then to the principal?

(Deed of Trust, Article II, Section 1.)

10. And finally, what is the effect of the very pledge itself of Contract “B,” which is referred to in the Deed of Trust as an agreement “to purchase unsecured obligations of the Railway Company to such amounts as will yield moneys sufficient, *after application of the proper, available income of the Railway Company*, and other moneys appropriated by it for the purpose, to provide for the payment of the Railway Company’s operating and maintenance expenses, taxes, and interest upon the bonds secured hereby, the annual payment to be made into the sinking fund provided for hereby, any other

expense that may be necessary to assure the continued operation of the Railway Company's property, etc."?

(Deed of Trust, Granting Clause, Section 6, Sub. 2.)

These are all matters which arise under the Deed of Trust, which is the subject matter of this action. But all of these questions are also necessarily involved in any suit on Contract "B," against the Denver and Rio Grande, under the authorities cited above, that this Court, having acquired jurisdiction to determine these questions, will prevent the Plaintiff from litigating them in another forum.

VI

Any moneys secured from the Denver and Rio Grande as contributions to the Interest Fund are an asset of the receivership.

While it is true that the money paid by the Denver goes to the Trustee in the first instance, still the Trustee is a mere custodian. Section 8 of Article VI of Contract B provides that these funds are to be paid to the fiscal agents of the Western Pacific at New York and San Francisco, for the benefit of the bondholders. In other words, the Trustee, at most, is a mere collection agent. The money received from the Denver is strictly the property of the Western Pacific, to be paid to its fiscal agents for the payment of its debts. It is true that the Contract and Deed of Trust provides that these funds shall not be available for any purpose other than the

payment of the interest, but that does not render them any the less assets of the Western Pacific. The Contract provides for the creation of a fund in the hands of the fiscal agent for interest. That fund has two sources; one is the earnings of the Western Pacific; the other is the amount of the deficiency to be made up by the Denver and Rio Grande. And it is difficult to see how one is any the less an asset of the defendant than the other.

VII.

The first mortgage or deed of trust of the Western Pacific, by virtue of the pledge of Contract "B", amounts to an equitable lien upon the properties of the Denver and Rio Grande, and the bill in this case is sufficient to establish, and if necessary, foreclose that lien.

Section 13 of Article VI of Contract "B," reads as follows:

"This agreement shall, except as hereinafter provided, continue in full force and effect, and be binding upon all the parties hereto, from the date hereof until all of said \$50,000,000, face value, of First Mortgage Five Per Cent. Thirty Year Gold Bonds of the Pacific Company shall be fully paid, principal and interest, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided in the First Mortgage of the Pacific Company, and shall run with the railways of the said several Railway

Companies, parties hereto, into whosoever hands the same may come; and this agreement and the provisions thereof shall be so construed that any person or persons, corporation or corporations, which may at any time acquire in any manner any of the said several railways of the parties hereto, shall be held and be deemed to have expressly agreed by virtue of the act or acts, deed or deeds, or other instrument of transaction by or through which the said person or persons, corporation or corporations, may immediately or indirectly have acquired the said several railways, or any thereof, to and with each and every of the parties hereto to observe and perform all of the terms required by this agreement to be performed or to be observed by the party hereto, from whom, immediately or indirectly, the said person or persons, corporation or corporations, may have acquired the said railways or railway, and the said person or persons, corporation or corporations, shall be held to be bound by an express contract with the parties hereto and by and upon an express trust to perform and observe as aforesaid all the terms hereof, including all acts and things that may be necessary to preserve in full force the several obligations and agreements herein established or contained for the full term hereof; and the obligations and provisions of this agreement shall be deemed to be part of the consideration of any contract or contracts, of whatever form or nature the same may be, and of any other

transaction by which any person or persons, corporation or corporations, may acquire or undertake to acquire the said several railways or any of them. Each of said Railway Companies parties hereto further covenants and agrees with all the other parties hereto that if it shall at any time during the continuance of this agreement, by lease, sale, consolidation or otherwise, convey or in any manner transfer its property or its rights and franchises in or to all or any of the premises affected hereby, then any instrument containing or setting out any such lease, sale, consolidation or other conveyance, shall contain a covenant that the same is made subject to all the provisions of this instrument, and that its lessee, grantee, successor or other transferee, as the case may be, and any and every person or corporation claiming under any such lessee, grantee, successor or other transferee, shall, by the acceptance of such instrument and by the acceptance of such lease, grant, consolidation or other conveyance, become bound to perform and observe all of the terms hereby required to be performed or observed by the party making such lease, grant, consolidation or other conveyance, including all acts and things that may be necessary to preserve in full force the several obligations and agreements herein established or contained for the full term hereof."

In the case of *Ketchum vs. St. Louis*, 101 U. S., 306, the Supreme Court say:

"We are of opinion that no insuperable obstacle exists in the way of a court of equity giving effect to this agreement or contract between the parties as against those whom the law charges with notice thereof. The relief granted by the decree seems to be in accordance with established rules in such cases.

In *Legarde vs. Hodges*, Lord Thurlow said: 'I take this to be a universal maxim, that wherever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him voluntarily, or with notice, raised a trust. These persons have so claimed; and, therefore, this is a pure trust estate,' and they must be declared trustees. 1 Ves., Jr., 478. In the report of that case in 3 Bro. Ch., 531, the Chancellor says: 'I take the doctrine to be true, that when parties come to an agreement as to the produce of land, the land itself will be affected by the agreement.' Upon rehearing, the former decree was affirmed. 4 Bro. Ch. 422.

In *re Strand Music Hall Co.*, 3 De. G. J. & S., 147, the question arose whether that company had created a valid charge on their real property. 'There can, I think,' said Lord Justice Turner, 'be no doubt that it was intended by these agreements to create a charge upon the property of the company, but it was said on the part of the official liquidator that this intention was not well carried into effect. I apprehend,

however, that where this Court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it.'

The doctrine is thus stated by Mr. Justice Story, in his *Equity Jurisprudence*, Vol. 11, Sec. 1231: 'Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate, but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers or have notice; for it is a general principle in equity that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust.' The author cites, in support of these views, *Legard vs. Hodges* (*supra*).

See also, in *Pinch vs. Anthony*, 8 Allen, 536, 'It is well stated that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons who are either volunteers or who take the estate on which the lien is agreed to be given, with notice of the stipulation. Such

agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity to fulfill it.'

In the recent work of Mr. Jones on Mortgages, Vol. 1, Sec. 162, the author remarks: 'In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts, which are wanting in one or both of these characteristics of a common law mortgage, are often used by parties for the purpose of pledging real property or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are, therefore called equitable mortgages.' So, also, in his treatise on Railroad Securities, p. 57, the same author says: 'An agreement of a company to set apart specific earnings or property in the hands of a third person to meet the interest or principal of its bonds, creates an equitable lien or charge.' Willard, Eq. Jur., 462; *Watson vs. Wellington*, 1 Russ & M., 604; *Yeates vs. Groves*, 1 Ves., Jr., 280; *Lett vs. Morris*, 4 Sim. 607, Ex parte Alderson, 1 Madd. 53."

In *Higgins vs. Manson* 126 Cal., 469, the Supreme Court of California quotes *Howard vs. Iron, etc., Co.*, 62 Minn., 298, as follows:

“‘Every express agreement in writing whereby the party clearly indicates an intention to make some particular property therein described a security for a debt, creates an equitable lien upon the property, which is enforceable. The form of the writing is not important, provided it sufficiently appears that it was thereby intended to create a security. If that intention appears, it will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged.’ (Citing in support thereof, 2 Pomeroy’s Equity Jurisprudence, Secs. 1235, 1236; *Payne vs. Wilson*, 74 N. Y., 348; *Daggett vs. Rankin*, 31 Cal., 321; *White Water, etc., Co. vs. Vallette*, 21 How., 414.”

In *Walker vs. Brown*, 165 U. S., 164, the Supreme Court say:

“It is well settled, said the Court, in *Pinch vs. Anthony*, 8 Allen, 536, ‘that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal estate of which he is the owner or possessor, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons, who are either volunteers or who take the estate on which the lien is agreed to be given, with notice of the stipulation.’ The subject was very fully reviewed with reference to the English and American authorities in *Ketchum vs. St. Louis*, 101 U. S., 306

(25:999), where the language just cited was approved, and that ruling was considered and reaffirmed, during this term, in *Fourth Street Nat. Bank vs. Yardley*, 165 U. S. 634. Pomeroy in his work on Equity Jurisprudence (Vol. 3, p. 1235), condenses and states the general result of the authorities on the subject, as follows:

‘The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice * * * The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, equity regards as done, that which ought to be done.’”

It will be seen, under these authorities, that Contract “B” is clearly an agreement, by the terms of which the railroads of the Denver and Rio Grande and the Rio Grande Western (now consolidated into the Denver and Rio Grande), are impressed with liens:

1. In favor of the bondholders of the Western Pacific, for at least interest and sinking fund;
2. In favor of the Western Pacific itself for other expenses necessary to its maintenance.

But this agreement, so constituting a lien upon the Denver and Rio Grande, is made a part of the security of the First Mortgage of the Western Pacific. *This clearly constitutes this First Mortgage of the Western Pacific, a mortgage also upon the railroads of the Denver and Rio Grande.* It is, of course, well settled, that where a deed, lease, or other instrument is incorporated in a mortgage by reference, the two instruments should be read and construed together.

27 Cyc., 1135.

It is equally well settled, and indeed, is provided by the statute in California, that a mortgage cannot be foreclosed piecemeal, but that the decree must settle and adjust all the equities.

Code Civ. Proc. of California, Sec. 726.

The object of this enactment is explained in *Ould vs. Stoddard*, 54 Cal., 615, as follows:

“It is not difficult to discover the policy which dictated the enactment of this statute. The tendency of modern legislation is to prevent a multiplicity of suits, and no one doubts the wisdom of it. In order to give this statute the force and effect which the Legislature intended it should have, we must hold that by

prosecuting an action upon the note secured by the mortgage to final judgment, the plaintiff has exhausted his remedy upon both the note and the security. To hold otherwise would be to hold that there may be two actions, where the statute declares there can be but one."

So, it is held that if one has a mortgage upon two pieces of property, and forecloses only as to one, he waives his right to proceed upon the other. Thus, in *Hall vs. Smott*, 80 Cal., 348, a debt was secured by a mortgage on one piece of land, and a deed in the nature of a mortgage to another piece. A suit was brought to foreclose on both. A demurrer was sustained as to the land secured by the deed, and plaintiff then voluntarily dismissed it out of his complaint.

The Supreme Court say, page 353:

"The Code of Civil Procedure, Section 726, provides that there can be but one action for the recovery of any debt secured by mortgage upon real estate. In applying this section in *Ould vs. Stoddard*, 54 Cal., 613, it was held that a mortgagee who commenced and prosecuted a suit to final judgment in the state of Ohio, upon a promissory note secured by a mortgage upon land in this state, exhausted his remedy upon both the note and security, and could not thereafter maintain a suit to foreclose the mortgage.

It is therefore apparent that as the deed in controversy was for the benefit of the same

parties as those to the deed of December 20, 1882, and to secure the same indebtedness, although upon different property, it should by appropriate allegations in the amended complaint in *Arnott vs. Waterhouse*, in which the last-mentioned deed was foreclosed, have been included and foreclosed. It is no excuse to say that the court sustained a demurrer to the complaint in which an effort was made to include it, as we are bound to presume that the ruling of the court was correct and the complaint insufficient to make evidence the necessary connection between the two deeds.

The plaintiffs in that suit exhausted their remedy upon their security, and by failing to include the deed in controversy, waived any security afforded by it, and the lien thereby given was nullified. (*See Mascaral vs. Raffour*, 51 Cal. 242.)"

And it is well settled law that the remedy of a mortgagee is governed by the *lex fori*.

Willard vs. Wood, 135 U. S., 309;

Johnson vs. Wilson, 180 U. S. 440.

So that, not only is the present action sufficient to foreclose this equitable mortgage on the Denver and Rio Grande, but no other action can be maintained. In other words, if a decree should be entered here, foreclosing this mortgage, without enforcing the claim against the D. & R. G., that decree would be a bar to any subsequent action.

But, it seems highly probable that the true interpretation of the above quoted provision of Contract "B" gives the Denver and Rio Grande an equitable lien upon the property of the Western Pacific. If Contract "B" were not a part of the First Mortgage, this lien, of course, would be subordinate to that instrument. But the lien upon the properties of the Denver is at all times dependent for its amount, at least, upon the provisions of Contract "B" to the effect that the Western Pacific's earnings are to be applied to the interest and sinking fund, after the operating expenses are paid, and thus to reduce the amount of the Denver's liability. In other words, we come back again to the proposition, that the Denver's liability, which is secured by an equitable mortgage on its railroads, is not for any fixed definite sum, but for the deficiency in the earnings of the Western Pacific. Accordingly, in arriving at the nature and amount of the lien upon the property of the Denver, the Court is bound to examine and interpret the provision of Contract "B" that its provisions run with the railroads of the Western Pacific, and to determine the questions as to how far a purchaser of the latter's property at foreclosure sale, is bound to apply its earnings to mitigate the rigor of the Denver's penalty.

In this connection, we desire to call attention to the litigation in the case of the Wabash Railroad, as applicable to many of the questions, particularly of procedure, involved here.

In 1862, the Toledo & Wabash issued and sold

\$600,000.00 par value of "equipment bonds." This paper was not secured by any mortgage, deed of trust, or other direct lien upon any property. The Toledo and Wabash was afterwards consolidated, with other railways in the States of Ohio, Indiana, Illinois, and Missouri, into the "Wabash System." This consolidation was by virtue of the corporation laws of the several states. The constituent companies, and finally the consolidated company, created certain bond issues, secured by mortgages and deeds of trust. Upon default in payment of the interest upon one of these issues, an action was brought in 1875, a receiver appointed, and a decree directing the sale of the property was made and entered. A sale was made to a bondholders' committee, which formed the Wabash, St. Louis and Pacific Railway Company, and the property was conveyed to this new corporation by the committee. One Ham then brought an action in the United States Circuit Court for the District of Indiana. Ham was the owner of certain of these equipment bonds; and he contended that they constituted a lien upon so much of the property as had formerly belonged to the Toledo & Wabash, and that he was entitled to follow that property through the consolidation, the decree, and the sale. The Circuit Court held with him, but the Supreme Court reversed the decree, declaring that the equipment bonds did not constitute a lien.

Wabash, etc., Ry. Co. vs. Ham, 114 U. S. 587.

While this litigation was pending in the Federal

Courts, one Compton brought his action in the State Court of Ohio. He was also the owner of a large block of these equipment bonds. He made the same contentions as did Ham, and the *Nisi Prius* Court of Ohio gave him judgment. Upon appeal, this judgment was affirmed by the Supreme Court of Ohio, although that Court was constrained to definitively align itself in opposition to the authority of the Supreme Court of the United States in the Ham case.

Compton vs. Wabash, etc., Ry. Co., 16 N. E.
110.

One of the Justices of the Supreme Court of Ohio, however, dissented, holding himself bound both by the authority and reasoning of the Ham case.

Compton vs. Wabash, etc., Ry. Co., 18 N. E.
380.

This, then, was the state of the record:

1. The United States Circuit Court for Ohio had by its decree of foreclosure, sold the whole property;
2. The United States Circuit Court for Indiana, in the Ham case, had decreed the equipment bonds to be a lien, but this decree had been reversed by the Supreme Court of the United States, and the bonds declared *not* to be a lien;
3. The Supreme Court of Ohio, in the Compton case, had decreed that the bonds *were* a lien, and, ordered the property sold to satisfy them.

James R. Jessup and Edward H. Dixon, trustees under a mortgage of the reorganized Wabash System brought a suit in the United States Circuit Court of Ohio for the foreclosure of their mortgage. This action was pending and the reorganized road was in the hands of a receiver at the time of the decision of the Supreme Court of Ohio in the Compton case. After the rendition of the judgment, but before execution, the complainants obtained an order of the United States Circuit Court, based upon Section 8 of the Act of Congress of March 3, 1875, making Compton a party, directing that subpoena be served upon him in the District of Columbia, and requiring him to appear and set up his lien. After Compton's objections to the jurisdiction had been overruled, he answered, setting up the judgment of the Ohio State Court.

The U. S. Circuit Court decreed that he had a lien by virtue of the decision of the State Court, but made it subordinate to the four divisional mortgages on the System. A decree was made, directing sale under the foreclosure, but saving the rights of Compton.

An appeal was taken to the U. S. Circuit Court of Appeals of the Sixth Circuit. The main opinion, by Judge Taft, is exceedingly long, and is found in 68 Fed. 263. The first point to which we desire to call attention, is on the question of jurisdiction. Judge Taft says:

"When the bill was filed in the court below, the property which it was thereby sought to

sell on foreclosure was in the possession of receivers appointed by that court in a previous litigation instituted to foreclose mortgages junior to the Knox and Jessup mortgage, and to sell the road to pay all junior liens and floating indebtedness. It is true, the litigation had proceeded to foreclosure sale and final decree; but for some reason, not plainly disclosed, the court refused to deliver possession to the purchasers, and retained it in the custody of the court for the purpose of protecting the interests of all the parties to the original litigation. Knox and Jessup wished to foreclose their mortgage, to marshal all liens, to sell the road at the highest price, to preserve the road and its income from waste by the appointment of a receiver. It is manifest that no other court than that in which the receivers then in possession had been appointed *could grant such relief*. Whether other courts could decree foreclosure and marshal liens, or not, certainly no other court could take possession of and sell the road, *and deliver an unclouded title to a purchaser*. If Knox and Jessup could not file their bill in the court below, then the act of that court in maintaining possession of the mortgaged property through its receivers would result in great injustice to them, and would constitute an abuse of its process. To prevent this, the court below had inherent ancillary jurisdiction, pending its possession of the railroad to hear and determine all petitions for relief presented to it in respect

of the possession and control of the road. It is of no importance that the custody of the railroad was likely soon to be changed from the court to the intending purchaser under the previous foreclosure proceedings, at which time any tribunal of competent jurisdiction could give all the relief prayed by Knox and Jesup. Their mortgage was then due. They were not obliged to await the uncertain delays of other litigation before taking steps to assert their rights. They therefore properly appealed to the court below, as the only tribunal which could do so, to give them adequate relief at once; and this was properly accorded to them, without regard to the citizenship of the parties to their bill. The foregoing reasoning is fully supported by many decisions of the Supreme Court. Necessity and comity both require that where, by its officers acting under color of its order or process, a court has taken into its custody property of any kind, another court, though of equal and co-ordinate jurisdiction, should not be permitted either to oust the possession of the first court, or *in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked*. This principle has been laid down by the Supreme Court of the United States in a long line of cases. *Hagan vs. Lucas*, 10 Pet. 400; *Williams vs. Benedict*, 8 How. 107; *Wiswall vs. Sampson*, 14 How. 52; *Peale vs. Phipps*, Id. 368; *Bank vs. Horn*, 17 How. 151; *Pulliam*

vs. *Osborn*, Id. 471; *Freeman vs. Howe*, 24 How. 450; *Youley vs. Lavender*, 21 Wall. 276; *Bank vs. Calhoun*, 102 U. S. 256; *Barton vs. Barbour*, 104 U. S. 126; *Krippendorf vs. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27; *Covell vs. Heyman*, 111 U. S. 176, 4 Supt. Ct. 355; *Heidritter vs. Oilcloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135; *Gumbel vs. Pitkin*, 124 U. S. 131, 8 Sup. Ct. 379; *Railroad Co. vs. Gomila*, 132 U. S. 478, 10 Sup. Ct. 155; In re *Tyler*, 149 U. S. 181, 13 Sup. Ct. 785; *Porter vs. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008; *Byers vs. McAuley*, 149 U. S., 608, 13 Sup. Ct. Rep. 906. Again every court has inherent equitable power to prevent its own process from working injustice to any one, and may entertain a petition by the aggrieved person, *either in the form of a simple motion*, or by intervention *pro interesse suo* in the cause in which the process issued, or by ancillary or dependent bill in equity, and may afford such relief as right and justice require. The existence of such a power, independent of statutory jurisdiction, is recognized by the Supreme Court in *Freeman vs. Howe*, 24 How. 250; *Minnesota Co. vs. St. Paul Co.*, 2 Wall. 609-633; *Railroad Co. vs. Chamberlain*, 6 Wall. 748; *Krippendorf vs. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27; *Pacific R. Co. of Missouri vs. Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 Sup. Ct. 583; *Stewart vs. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163; *Phelps vs. Oaks*, 117 U. S. 236, 6 Sup. Ct. 714; *Dewey vs. Coal Co.*, 123 U. S. 329, 8 Sup. Ct. 148; *Gumbel vs. Pit-*

kin, 124 U. S. 131, 8 Sup. Ct. 379; *Johnson vs. Christian*, 125 U. S. 642-646, 8 Sup. Ct. 989, 1135; *Morgan L. & T. Railroad & Steamship Co. vs. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61.

Now, it frequently happens that under the process of the federal courts, exercising the original and lawful jurisdiction conferred expressly by the federal constitution and statutes, possession is taken and control exercised over property in which persons not indispensable parties to the suit have an interest, *by lien, mortgage, and in other ways*. In such cases there often is no diversity of citizenship between such persons and the plaintiff or defendant to the suit which would warrant the federal court in hearing an independent suit between them. But it may be essential, to preserve intact their rights in the property that such third persons should be permitted, at once, to have specific relief, which can only *be granted by a court having possession and control of the property*. And yet, in accordance with the principle already stated, no court but the federal court can exercise possession and control over the property in its custody. Of necessity, therefore, the federal courts exercise an ancillary jurisdiction in such cases; and third persons are permitted to come into the federal court, and set up their interest in the property, and secure the same full and adequate protection and relief to which they would be entitled in any court of competent

jurisdiction, were the property not impounded by the federal court."

In upholding the right of the Court to compel Compton to come in, the Judge says:

"We come now to the objection that, even if the jurisdiction of the bill be conceded, the court had no power to bring Compton before it. The argument is that the right of the federal court to grant relief to persons claiming an interest in property in its custody, without regard to their citizenship, is founded on its duty to prevent an abuse of its process to the prejudice of strangers to the suit, and is dependent on the wish of such strangers to secure that relief, expressed in an affirmative and voluntary appeal for the aid of the court, and that no power exists in the court to compel such a stranger to come into court against his will, simply because he claims an interest in the property impounded, if his citizenship would prevent the issue of such process against him in the original suit. Let it be conceded, for the purpose of argument, that the distinction made is a sound one. It does not help Compton. He was not brought into court to prevent prejudice to him by the federal court's possession of the *res*. He was brought into court to prevent prejudice to Knox and Jesup, who, otherwise having no right to invoke the action of the federal court, did so on the ground that its possession of the *res* prevented their getting full and adequate relief in

the state tribunals, and who were therefore entitled to bring into the case every one whose presence as a party was necessary to give them such relief. They had the right to have the railroad sold free from all liens, so that the purchaser should have an unclouded title, *and this could not be done without Compton's presence*. Compton was not a resident of the district in which the court's ordinary process ran, and he could not be brought in by subpoena. Knox and Jesup's bill was, however, a proceeding against property in the jurisdiction of the court. It was competent for congress, in such a case, to provide for constructive service, which would bind the person against whom it issued to the extent only of the res which lay within the territorial jurisdiction of the court.

Pennoyer vs. Neff, 95 U. S. 714;

Heidritter vs. Oilcloth Co., 112 U. S. 294, 300,
301, 5 Sup. Ct. 135.

Statutory provision of this kind is found in Section 8 of the act of March 3, 1875 (18 Stat. 470), which was not repealed by the jurisdiction act of March 3, 1887 (24 Stat. 552), or of August 13, 1888 (25 Stat. 433) and is still in force.

It provides:

‘That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon

the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if said absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and

under the jurisdiction of the court therein, within such district.'

The meaning of this statute is not doubtful. It applies to every suit of the kind mentioned in the section provided, only, the circuit court of the United States in which the proceeding is taken has otherwise jurisdiction of it. Whether it be a suit arising under the laws and constitution of the United States, or a suit to which the United States is a party, or a suit in which there is a controversy between citizens of different states, or a suit like the one at bar, of which the circuit court has jurisdiction indispensable and ancillary to its original jurisdiction, if it also satisfies the description of the statute, the process therein provided is available. The case of *Brigham vs. Luddington*, 12 Blatchf. 237, Fed. Cas. No. 1,874, has nothing in it to conflict with this conclusion. In that case, Circuit Judge Woodruff refused to make an order for substituted process against the owner of the property, because he was a citizen of the same state as the complainant, and his presence as a party would oust the jurisdiction of the court. The bill was an original one, and the jurisdiction could only rest on diverse citizenship. In the suit at bar, Compton's presence as party defendant would not oust the jurisdiction of the court, because as already shown, it is not dependent on diverse citizenship. The circuit court had jurisdiction of the cause otherwise than by virtue of the section above

quoted. The suit was brought to enforce a legal and equitable lien on real estate lying in the district, and to remove the cloud of Compton's lien from the title of the purchaser at the foreclosure sale. Compton was therefore properly brought into court by the substituted or constructive process provided in the section above quoted. *Farmers' Loan & Trust Co. vs. Houston & T. C. Ry. Co.*, 44 Fed. 115; *Greeley vs. Lowe*, 155 U. S. 58, 15 Sup. Ct. 24."

In holding that the Court has the power to compel a party to the action to convey property lying outside its territorial limits, it is said:

"That a court has the power, when it has personal jurisdiction over the mortgagor, to foreclose the mortgage on property lying outside of its territorial jurisdiction, is plain, and is fully established by the case of *Muller vs. Dows*, 94 U. S. 444, but it must exercise this power by a decree against the person compelling the mortgagor to convey the equity of redemption. Otherwise the decree is inoperative.

Carpenter vs. Strange, 141 U. S. 87, 106, 11 Sup. Ct. 960."

On the point that a junior incumbrancer is entitled to an accounting and credit for income during receivership, and after sale, it is said:

"It remains to inquire how the amount to be paid in redemption of the two divisional mortgages shall be estimated. Of course, the mort-

gagees are entitled to the principal of their mortgages, with interest to the time of tender; but the more doubtful question is whether the amount thus to be calculated must be reduced by the net earnings of the mortgaged property, i. e., the Ohio division, since the receivers turned over possession of the road to the purchaser. Compton secures his right to redemption through the original mortgagors. Whatever they would have had to pay to redeem the mortgages, he must pay,—no more, no less. It is the general rule that a mortgagee in possession, when his mortgage is redeemed, must account for the rents and profits during his tenancy. *Russell vs. Southard*, 12 How. 139, 155. The Wabash Railroad Company, as the successor in title of the purchasers at the sale, is to be regarded as the first Ohio mortgagee in possession, and therefore liable to account for the rents and profits or net earnings of the mortgaged property, in ascertaining the amount required to redeem the principal and interest of the mortgages. Our view of the saving clause in the decree for sale makes Compton's attitude with respect to the foreclosure sale quite like that of a junior incumbrancer with respect to a sale in a foreclosure proceeding brought by a senior mortgagee, to which the former was not a party. In such a case the weight of authority is that the purchaser is, with reference to the junior incumbrancer, the assignee of a mortgage in possession, and therefore liable to account for the rents

and profits. Jones Mortg. (5th Ed.), Sec. 1395; 2 Hill Morg. 158; *Vanderkamp vs. Skelton*, 11 Paige 28; *Walsh vs. Insurance Co.*, 13 Abb. Prac. 33; *Van Duyne vs. Shann*, 39 N. J. Eq. 6; *Bunce vs. West*, 62 Iowa 80, 17 N. W. 179; *Spurgin vs. Adamson*, 62 Iowa 661, 18 N. W. 293; *Ten Eyck vs. Casad*, 15 Iowa 524; *Murdock vs. Ford*, 17 Ind. 52. In two cases a different view has been taken. *Catterlin vs. Armstrong*, 79 Ind. 514; *Renard vs. Brown*, 7 Neb. 449; 2 Jones Morg. (5th Ed.), Sec. 1118 A.

The theory upon which the last-mentioned cases go, is that, by the defective sale, not only the mortgage passed to the purchaser by assignment, but also the equity of redemption, and the purchaser must be presumed to be holding the property as owner of the equity, rather than as mortgagee, and therefore not to be accountable for the rents and profits. If the purchaser becomes the possessor of the property by the payment of anything substantial over and above the foreclosed mortgage debt, the argument is a strong one that the rents and profits should be used to recompense him for such an outlay in securing the possession of the property. *Gray vs. Nelson*, 77 Iowa 63, 41 N. W. 566. But where, as in the case at bar, the purchase price is equal only to the amount due on the first two mortgages, it would not seem consistent with equity to permit such a purchaser to maintain, against a junior incumbrancer seeking to redeem, that he is receiving the rents and profits

as the owner of the equity, rather than as the owner of the mortgages which are galvanized into life to meet and defeat the otherwise good claim of the junior incumbrancer to a first lien. When the sale in this case took place, the mortgaged property was in the hands of receivers,—that is, the mortgagees were in possession—and the rents and profits were applicable to the mortgages in the order of their priority. *Howell vs. Ripley*, 10 Paige 43; *Miltenberger vs. Railway Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140. If, as to Compton, the sale merely operated as an assignment of the various interests of the parties, the purchaser, as the assignee of the prior mortgages in possession, would seem to have derived his possession, and to maintain it, through the mortgagees, rather than from the owner of the equity of redemption. For these reasons, I think that Compton is entitled to an account of the net earnings of the Ohio Division of the Wabash Railroad Company over and above all operating expenses, including reasonable and necessary repairs, and that this sum should be deducted from the principal and interest due on the two mortgages. Of course, the railroad company is entitled to credit for all taxes paid by it, and for the cash advanced by it, in lieu of the bonds under the first mortgages, to pay receiver's obligations and other expenses properly chargeable as liens against the corpus of the road prior in right to the mortgages."

The Judges of the Circuit Court of Appeals were, however, unable to agree upon some of the questions presented, and accordingly certified it up to the Supreme Court. It was there held that Compton was entitled to a resale, and in determining the amount he should pay on the divisional mortgages, or the amount of the proceeds to which he was entitled, that an account should be had of the net earnings of the road.

Compton vs. Jessup, 167 U. S. 1.

Adelbert College of Western Reserve University was the owner of some of the same equipment bonds. It also brought an action, obtained judgment, and the judgment was affirmed by the Supreme Court of Ohio, in a memorandum decision.

Wabash Ry. Co. vs. Adelbert College, 78 N. E. 1141.

The Wabash took this judgment to the Supreme Court of the United States:

Wabash, etc., Co. vs. Adelbert College, 208 U. S. 37.

On the writ of error, the Supreme Court held that, although the actual property had passed from the receiver to a purchasing committee, yet the Circuit Court, by *reserving the power to adjudicate Compton's lien, still retained jurisdiction of the res*, and that no action, even by another person, involving the question so reserved, could be brought in any other court, and accordingly reversed the Supreme Court of Ohio.

The language is as follows:

“When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto, and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, *or the control of the property*. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of the diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the

others, but serve to prevent a conflict over the possession of property which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially, and with a spirit of respect for the just authority of the states of the Union.

Hagan vs. Lucas, 11 Pet. 400, 9 L. Ed. 470;

Williams vs. Benedict, 8 How. 107, 12 L. Ed. 1007;

Wiswall vs. Sampson, 14 How. 52, 14 L. Ed. 322;

Peale vs. Phipps, 14 How. 368, 14 L. Ed. 459;

Pulliam vs. Osborne, 17 How. 471, 15 L. Ed. 154;

Taylor vs. Carryl, 20 How. 583, 15 L. Ed. 1028;

Freeman vs. Howe, 24 How. 450, 16 L. Ed. 749;

Buck vs. Colbath, 3 Wall. 334, 18 L. Ed. 257;

Yonley vs. Lavender, 21 Wall. 276, 22 L. Ed. 536;

People's Bank vs. Calhoun, (*People's Bank vs. Winslow*) 102 U. S. 256, 26 L. Ed. 101;

- Barton vs. Barbour*, 104 U. S. 126, 26 L. Ed. 672;
- Krippendorf vs. Hyde*, 110 U. S. 276, 28 L. Ed. 145, 4 Sup. Ct. Rep. 27;
- Pacific R. Co. vs. Missouri P. R. Co.*, 11 U. S. 505, 28 L. Ed. 498, 4 Sup. Ct. Rep. 583;
- Covell vs. Heyman*, 111 U. S. 176, 28 L. Ed. 390, 4 Sup. Ct. Rep. 355;
- Heidritter vs. Elizabeth Oil Cloth Co.*, 112 U. S. 294; 28 L. Ed. 729, 5 Sup. Ct. Rep. 135;
- Gumbel vs. Pitkin*, 124 U. S. 131, 31 L. Ed. 374; 8 Sup. Ct. Rep. 379;
- Johnson vs. Christian*, 125 U. S. 642, 31 L. Ed. 820, 8 Sup. Ct. Rep. 989, 1135;
- Morgan's L. & T. R. & S. S. Co. vs. Texas C. R. Co.*, 137 U. S. 171, 34 L. Ed. 625, 11 Sup. Ct. Rep. 61;
- Porter vs. Sabin*, 149 U. S. 473, 37 L. Ed. 815, 13 Sup. Ct. Rep. 1008."

After all these years of litigation, the Wabash was finally reorganized, and certain of the bonds held by a committee, were exchanged for new bonds, and common and preferred stock. A suit was brought in the Supreme Court of the State of New York by a stockholder, alleging that this issue was *ultra vires* and void. It was removed to the Federal Court, but on appeal the United States Circuit Court of Appeals remanded the cause to the state court.

Pollitz vs. Wabash R. Co., 176 Fed. 334.

Pending this litigation (in 1911) the road again went into the hands of a receiver. Judgment was secured in the lower court, declaring that the issue of bonds and stocks was illegal and void. Upon appeal to the Appellate Division, this judgment was modified, but the Directors were required to account to the Company in the sum of over \$5,000,000.00. The last decision was April 15, 1915.

Pollitz vs. Wabash R. Co., 152 N. Y. S. 803.

It is apparent, that much, if not all of this litigation, lasting over forty years, was due to the fact that different courts took jurisdiction of the same questions, and arrived at different conclusions.

Now, not only must the lien of Contract "B" be determined in this action, but also the *rank* of that lien. This leads us to an examination of the other documents, which the receivers have reported to this Court in their petition for six months' time. We find that the Western Pacific created a second mortgage, in the sum of \$25,000,000.00, of which the Central Trust Company of New York is trustee. Under the agreement with the Denver, all of these second mortgage bonds were taken by that road. But we find in Subdivision 1, of Section 1 of Article Two, of this second mortgage, a provision that \$10,863,000.00 par value of these second mortgage bonds were to be delivered to the Bankers' Trust Company, as security for the Denver's First and Refunding Mortgage, dated Aug. 1, 1908. The bankers who handled the finances of the First and Refund-

ing Mortgage, also made agreements,* to which first the Bowling Green Trust Co., and later, the Equitable Trust Company, were parties, by which Western Pacific Second Mortgage Bonds were pledged under the First and Refunding Mortgage; and in countless ways, the fiscal operations, and the terms of the First and Refunding Mortgage import knowledge of the relations of the Denver and the Western Pacific.

Then, in 1912, the Denver created another mortgage of which the New York Trust Co. is trustee, known as the Adjustment Mortgage, which, by its very terms, recognizes the existence of the liability of the Denver to the bondholders of the Western Pacific.

It would seem clear then:

1. That this Court will order the Denver & Rio Grande, the Central Trust Co., the Bankers' Trust Co., and the New York Trust Co. to be made parties to this suit.

2. That this Court will then compel them to litigate the questions, (a), as to whether there is an equitable mortgage on the Denver for the benefit of the Western Pacific bondholders; (b), if so, the rank of that lien, as compared with the Denver's First and Refunding Mortgage, and its Adjustment Mortgage; and (c), whether or not the Denver has any further claim to or lien upon the Western Pacific after sale under foreclosure.

VIII.

Contract "B" is an entire contract, with correlative and mutually interdependent rights and duties, and no judgment could possibly be rendered fixing the Denver's liabilities, which does not at the same time determine its correlative rights.

Upon the oral argument, the Court asked the question: "Why was Contract 'B' ever made?" The answer is to be found in the history of the construction of the Western Pacific, particularly as shown in the various documents returned to the Court in the petition of the receivers, and used upon this hearing.

1. Contract "A", also pledged under the First Mortgage, provides that as long as any of the bonds are unpaid, the Denver shall have the right to use the line of the Western Pacific, as provided in Contract "B".

2. Contract "B" recites that upon the completion of the Western Pacific it would form a through line with the Denver, and that the Denver has no other outlet to the Pacific Coast not controlled by a competitor.

3. Contract "B" recites that *all* benefits to be derived from it are pledged under the First Mortgage.

4. The Denver agrees, as far as it lawfully may, to deliver to the Western Pacific all west-bound tonnage, and the Western Pacific agrees to deliver to the Denver, all east-bound freights.

5. The Western Pacific agrees to complete its line to Salt Lake City, with all reasonable diligence.

Now, aside from the strictly financial part of Contract "B", it is clear that it was executed by the Denver as a means of securing an outlet to the Pacific Coast, by the construction of a railroad from Salt Lake to San Francisco. In order to assure this, the Denver pledged its credit, in return for an agreement which made the Western Pacific to all intents and purposes, a part of the Denver. In other words, the *consideration* for the promise to pay interest and sinking fund, was the promise of the Western Pacific to deliver all traffic to the Denver.

But the plaintiff, conceding that so far as the traffic part of the contract is concerned, it must be interpreted and enforced in the present action, claims the right to enforce the reciprocal promise of the Denver in another forum. Here are mutually reciprocal covenants; in effect, the Denver says to the Western Pacific: "If you will give me all your traffic, I will guarantee the interest on your bonds"; the Western Pacific says to the Denver: "If you guarantee my interest, I will deliver you all my traffic."

The proposition of plaintiff is, that it can, and must, leave this Court to enforce the traffic part, but that it can go to New York and enforce the correlative obligation of the Denver there.

But the question as to whether or not the Denver has the right to compel the Western Pacific to live

up to the traffic and trackage arrangements, is of necessity and concededly a matter for this Court, inasmuch as it directly concerns the operation of the physical property. So, when this Court comes to frame its decree *nisi*, it will determine whether or not a purchaser shall take the property so tied to the Denver, or free from these obligations. It is true, that Contract "B" provides that the bondholders may compel its abrogation as to these features; it is true also, that it contains provisions that this abrogation shall not relieve the Denver from its obligation to pay interest and sinking fund. But the fact remains, that this Court must interpret those very provisions, and say, by its decree, how far, if at all, they can be made operative.

But, supposing the District Court in New York, in interpreting Contract "B", as prayed for in the Dependent Bill, should make and enter its decree to the effect that the Denver is bound to pay the interest and sinking fund, but only upon the condition (a) that the Western Pacific shall apply its earnings above operating expenses and taxes to that purpose, and, or (b), that the Western Pacific should continue to form a through line from Denver to San Francisco, and deliver all its freight to the Denver and Rio Grande.

Such a decree would be the clearest kind of an interference with the physical property actually in the possession of the receivers.

Such a judgment may not be probable. But it is not impossible that the New York Court might

say, that if Contract "B" is a guaranty at all, it is a continuing guaranty, and must be supported by a continuing consideration.

Cal. Civ. Code, Sec. 2815;

White Sewing Machine Co. vs. Courtney, 141 Cal. 676;

Pingrey on Suretyship, Sec. 346.

But whatever the outcome may be, it is certain that any decree fixing the Denver's liability, must also fix its correlative *rights*, and no decree can be possible concerning those rights, which will not have for its subject matter the railroad of the Western Pacific.

IX.

Both the deed of trust and Contract "B" give the Western Pacific the right to bring an action. That right, of course, passes to the receivers. The right of the trustee to bring the suit likewise passed to the receivers by the act of the trustee in filing the bill to foreclose, and in causing the appointment of the receivers.

Contract "B" contains the following provision:

"The Trustee, as well as the Pacific Company, its successors and assigns, shall be entitled to specific performance of the same, and of any agreement substituted therefor, and to enforce the same and if any agreement substituted therefor by suits in equity and actions at law or otherwise, as may be appropriate."

(Article VI, Section 14.)

The Deed of Trust provides as follows:

"The railway company covenants and agrees that it will enforce by suit or suits in equity or at law, or by other proper proceedings, all the terms and provisions of any and all of the agreements described in paragraph sixth of the granting clauses hereof, and any and all traffic and trackage and other agreements pledged or deposited hereunder, or made with, or assigned to, the Trustee for the benefit or protection of the holders of the bonds secured hereby, and likewise of all modified agreements which may be substituted for any of said above-mentioned agreements, in accordance with the provisions hereof; and that it will perform any and every act, and observe any and every condition requisite to the maintenance of each and all said agreements in full force and virtue; provided, however, that the trustee shall from time to time, if requested by the holder of any bond secured hereby and satisfactorily indemnified against the expense of so doing, enforce in like manner any of the provisions of Article II of said above-mentioned agreement between the Denver and Rio Grande Railroad Company, the Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company that require any payments to be made to the Trustee by the parties of the first part to said agreement, and

that the Trustee may, in its discrêtion, and, upon the request of the holders of twenty per cent, in amount of the bonds secured hereby at any time outstanding, being indemnified to its satisfaction against the expense of so doing, shall, in like manner, enforce all the terms and provisions of any and all such agreements, acting in each case either alone or with the Railway Company, and either in its own name or in the name of the Railway Company, or in name of both; and the expense of so doing shall, upon demand of the Trustee, be paid by the Railway Company, and in default of such payment, shall be a charge in favor of the Trustee upon all of the premises and property mortgaged or pledged hereunder prior to the lien of the bonds secured hereby."

These provisions clearly give to the Western Pacific the right to bring an action to force the Denver and Rio Grande to make the payments specified in Contract "B". And the order appointing the receivers directs them to bring such suits as may be necessary to protect the "property and trusts" given into their care. One of the trusts confided to them is to protect the rights of the bondholders in every possible way; and it would seem that it is as much their duty to see to it that the Denver and Rio Grande makes up the deficit, as to take care that by proper and economical management the property earns as large a sum as possible.

X.

The plaintiff has no interest in Contract "B", except that it is made trustee to hold that agreement along with the other assets pledged by the Western Pacific.

Broadly speaking, the First Mortgage Bonds are secured by five classes of collateral:

1. The physical properties.
2. The earnings of the Western Pacific.
3. Certain shares of the Capital Stock of subsidiary companies.
4. The right of the Western Pacific to a preference in traffic originating upon the Denver and the Missouri Pacific, and destined for this Coast.
5. The obligation of the Denver to make up deficiencies in sinking fund and interest.

All of these things make up a trust fund, held by the Equitable as security for the bondholders. Admittedly, the plaintiff has no *beneficial* interest in any part of this fund; admittedly, it has sought the aid of this Court in the administration of all the component parts of that fund except a part of the obligation of the D. & R. G. But, the so-called financial portion of Contract "B" was made with the Western Pacific, and the plaintiff is only a party to that contract in the same sense that it is a party to the First Mortgage,—that is to say,—it is a bare, naked trustee for the benefit of the bondholders.

Nor is it any answer to this plain proposition

to say that by the terms of Contract "B", the Equitable Trust Co. is given the power to enforce it. This provision, in the first place, adds nothing to it; for it is elementary that a trustee has the power to collect assets, irrespective of specific provisions to that effect. But, here again, Contract "B" does not differ from the rest of the First Mortgage. The latter instrument, by its specific terms, confers upon the trustee the power to enforce its provisions as to *all* the pledged property. It provides, for instance, that in the event of a default, the trustee can enter upon the property of the Western Pacific, and run the road for the benefit of the bondholders. But it has not chosen to do so; under direction of the requisite proportion of the bondholders, it was brought the property into this Court for orderly administration; and to say that this Court should, having assumed the responsibility of the whole, proceed to administer only a part, where all the parts are so closely entwined, is to state a proposition which refutes itself.

After all, Contract "B" is the contract of the Western Pacific. In its every aspect, it was made for the benefit of that corporation, and not the Trust Company. Its purpose was to enable the Western Pacific to sell *its* bonds; in the traffic arrangements, its purpose is to enable the Western Pacific to do a large business by virtue of the connections at Salt Lake with Eastern, Southern and Mid-Western territory; in the fiscal aspect of the contract the covenant is to pay the interest of

the Western Pacific. It is, therefore, the property of the Western Pacific in every possible sense, and being so, it passed, with the act of the plaintiff in filing the Bill to foreclose, into the hands of the receivers, to be there dealt with as this Court may direct.

XI.

The suit in New York may be an interference with a question necessarily determinable in this Court, to wit: The disposition of preferential claims.

The affidavits used on this hearing show that there are a large number of claims, accruing prior to the receivership which, on their face at least, seem to be preferential in character. These claims, aside from those of the Denver & Rio Grande, scarcely aggregate \$200,000.00; and if the claims of that corporation do not share, there will be sufficient diverted money to pay them in full, under the doctrine of the Ocean Shore case.

But the Denver & Rio Grande, aside from its claims upon the notes, and for interest on the Second Mortgage Bonds, has presented claims of over a million dollars, of which about one-half are clearly for operating expense. Furthermore, the Utah Fuel Company has filed here a petition in intervention claiming the sum of \$1,750,000.00 as entitled to share in the preferential funds. But under the terms of Contract "B", the Denver agrees to make up all deficiencies in operating expenses, and to pay the difference between net earnings and

interest and sinking funds. So, it may well be argued, that the Denver, being bound to make up operating expenses, cannot establish its claim, insofar, at least, as that claim is for operating expense. So, too, the claim of the Utah Fuel Co. is for money advanced, really to make up interest payments on the bonds, which the Denver, under Contract "B", had agreed to pay.

Now, no one would deny that the question of the adjustment and payment of preferential claims is a matter for this Court. But the relation of the Denver, and its obligation under Contract "B" is necessarily involved—in that the Court cannot say whether it is entitled to share in preferential funds without construing that contract.

XII.

The first mortgage does not by any means provide that Contract "B" shall not be subject to the control of the Court during foreclosure; it only attempts to prescribe its custody after foreclosure.

The provision of the First Mortgage upon which the plaintiff mainly relies is found in Section 9 of Article Five. It reads as follows:

"Section 9. Upon the completion of any sale or sales the Trustee shall execute and deliver to the accepted purchaser or purchasers a deed or deeds of transfer and release of the premises and property sold, or shall execute and deliver in conjunction with the deed or deeds of the person or officer, conducting such

a sale or proper release of such premises and property, and the Trustee shall deliver to such purchaser or purchasers all bonds, obligations and the certificates of all shares of stock, agreements and contracts, held by it and sold to such purchaser or purchasers, together with proper assignments and transfers of such bonds, obligations and shares, agreements and contracts; Provided, however, that so long as the Denver and Rio Grande Railroad Company and the Rio Grande Western Railway Company, or either of them, shall, by the terms of their said agreement with the Railway Company and the Trustee, be under obligation to make any payment or payments to the Trustee either for the purpose of providing funds wherewith to make payments of interest upon the bonds secured hereby or wherewith to make any payment into the sinking fund hereby provided for, the Trustee shall not deliver said last-mentioned agreement to any such purchaser or purchasers, although such purchaser or purchasers may have succeeded to any or all of the interest and rights of the Railway Company thereunder. The Trustee and its successor or successors are hereby appointed the true and lawful attorney or attorneys irrevocable of the Railway Company, in its name and stead, to make all necessary deeds of conveyance, sale and transfer of the premises and property hereby conveyed, mortgaged or pledged, and for that purposos may execute all necessary acts of con-

veyance, assignment and transfer, and may substitute one or more persons with like power, the Railway Company hereby ratifying and confirming all that its said attorney or attorneys, or such substitute or substitutes, shall lawfully do by virtue hereof. Any such sale or sales made under or by virtue of this indenture, either under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, shall divest all right, title, interest, estate, claim and demand whatsoever, either at law or in equity, of the Railway Company, or, in and to the premises and property sold, and shall be a perpetual bar both at law and in equity against the Railway Company, its successors and assigns, and against any and all persons claiming or to claim the premises and property sold or any part thereof, from, through or under the Railway Company, its successors or assigns. Nevertheless, the Railway Company shall, if so requested by the Trustee, ratify and confirm such sale by executing and delivering to the Trustee or to such purchaser or purchasers, all proper deeds, conveyances and releases as may be designated in such request.

The receipt of the Trustee or of the person or officer conducting any such sale shall be a sufficient discharge for the purchase-money to any purchaser of the property, or any part thereof, sold, as aforesaid, and no such pur-

chaser, nor his representatives, grantees or assigns, after paying such purchase-money and receiving such receipt, shall be bound to see to the application of such purchase-money upon or for any trust or purpose of this indenture, or be answerable in any manner whatsoever for any loss, misapplication or non-application of any such purchase-money or any part thereof."

It will be noted that this provision does not attempt to prescribe what shall be done with Contract "B" during foreclosure, nor prior thereto. Nor does it attempt, in any manner to limit the Court's power to enforce it as to any liability which may have accrued prior to an actual sale. The liability which accrued before this suit was started, and pending the receivership, is left in exactly the same position as any other asset. Nor does this provision in any way seek to take away from the Court, in an action to foreclose, the right and duty to construe Contract "B", nor to enter a decree declaring to what extent it will enure to the benefit of the Western Pacific and its bondholders, and to what extent it will bind the property of the Denver, after the sale takes place. All this provision purports to do, is to provide for the mere naked custody of the instrument after the sale. In other words, it contemplates that the property may be sold for less than the principal and interest of the bonds; in that event, it is probable that the liability of the Denver will survive as to the deficiency; and the provision in

question merely leaves the machinery of the actual collection of the semi-annual interest and sinking fund upon that deficiency in the hands of the trustee.

XIII.

The first mortgage itself, and the endorsement prescribed by that instrument, interpret Contract "B" to mean that the Denver has agreed to pay, not the interest and sinking fund absolutely, but only the difference between the earnings of the Western Pacific and the interest and sinking fund.

If, taking Contract "B" as a whole, it can be reasonably contended that there is any ambiguity, that ambiguity is removed by the interpretation placed upon the instrument by the First Mortgage itself. In prescribing the form of the bonds, the First Mortgage provides that each bond shall have endorsed upon it the following memorandum:

"The issue of bonds of which the within bond is one, is further secured by certain traffic and other contracts described in the mortgage within mentioned, being respectively:

(a) Traffic contract between the Missouri Pacific Railway Company and the Denver and Rio Grande Railroad Company;

(b) Contract for completion of the Western Pacific main line from San Francisco to Salt Lake City, between the Rio Grande Western Railway Company, the Western Pacific Railway Company and the Trustee of said mortgage;

(c) Contract between the Denver and Rio Grande Railroad Company and the Rio Grande Western Railway Company, the Western Pacific Railway Company and the Trustee of said mortgage, which contract among other things binds the Rio Grande Western Railway Company and the Denver and Rio Grande Railroad Company, jointly and severally to pay semi-annually to the Trustee of said mortgage such sums of money as may be necessary, *in addition to the earnings of the Western Pacific Railway Company and other moneys actually and lawfully appropriated by it for the purpose*, to meet the interest and sinking fund payments upon said issue bonds and to pay any taxes which the Western Pacific Railway Company may be required or permitted to pay thereon or deduct therefrom, except such taxes as said mortgage requires the Western Pacific Railway Company itself to pay."

And the granting part of the First Mortgage, by apt words, conveys to the Trustee, in trust to secure the bonds, various properties, including Contract "B", which is thus described:

"An agreement with the Denver and Rio Grande Railroad Company, the Rio Grande Western Railway Company and the Trustee hereunder, whereby said three railroad companies agree, among other things, to maintain a joint transportation system, and whereby the Denver and Rio Grande Railroad Company

and the Rio Grande Western Railway Company also jointly and severally agree, so long as any of the bonds secured hereby shall remain unpaid, principal or interest, to purchase unsecured obligations of the Railway Company to such amounts as will yield moneys sufficient, *after application of the proper, available income of the Railway Company and other moneys appropriated by it for the purpose*, to provide for the payment of the Railway Company's operating and maintenance expenses, taxes, the interest upon the bonds secured hereby, the annual payment to be made into the sinking fund provided for hereby, any other expense that may be necessary to assure the continued operation of the Railway Company's property and the unimpaired lien and priority of this indenture, any taxes that the Railway Company may be required by law or permitted to pay upon or deduct from the principal or interest of the bonds secured hereby and all interest upon indebtedness of the Railway Company other than said bonds, and to pay the purchase price of said obligations, so far as such payments shall be necessary to provide for the payment of the interest upon the bonds secured hereby and the payments to be made into the sinking fund for the redemption of said bonds to the Trustee, at such times and in such manner as to make the same available for the payments to be made therewith as aforesaid.

XIV.

Both the first mortgage and Contract "B" provide that a suit for the enforcement of the latter may be brought either by the trustee or the Western Pacific, or both together. If any suit is necessary at all, still, the action in New York cannot be maintained, for two reasons:

(1) Such a suit must be brought in the Court of Primary Jurisdiction;

(2) The question as to whether such a suit should be brought had been already submitted to this Court by the receivers.

We have already given our reasons why it seems to us that a separate action to establish rights and liabilities under Contract "B" is unnecessary. But even if it should be determined that such a suit is necessary or advisable, then two questions at once arise: (1) Where should this suit be brought; and (2), Who should bring it?

1. In the first place, as a matter of common sense and convenience, it would seem clear that an action which involves an accounting of property in the possession of this Court, is properly maintainable here and not elsewhere. And we think that if there ever was any doubt upon this subject, none has existed since *Central Trust Co. vs. East Tennessee, etc. R. R.*, 30 Fed. 896. In that case, an attempt was made in the Court of ancillary jurisdiction to establish a preferential claim, involving a general accounting. The Court says:

“The court having control of the main suit has, of course, direct control of the receiver appointed in the case, of all moneys coming to his hands, of the distribution of the same, and of the distribution of all funds derived from the sale of property sold under decrees in the cause.

It follows that if any account is to be taken of the funds that came to the receiver's hands, and of the earnings of the railway property while in the receiver's hands, and of the disposition made of all funds, in order to determine the existence of a priority of any lien, such account should be taken in the main cause, and cannot be taken in an ancillary suit, where the court has no possession of the fund. For instance, on this hearing, it is admitted that \$75,000 came into the hands of the receiver on his taking possession of the railway property, and that the same were earnings of the property prior to the receivership. This fund was confessedly subject to the liens for labor and supplies by which it was earned, and has been largely, if not entirely, so applied by the court in the main cause. Now, if any one has a lien on such fund, or on the property of the company by reason of such fund, say for a judgment recovered against the company prior to the receivership, an accounting and marshaling of liens must be had, and such accounting and marshaling can only be had in one court,

or inextricable confusion would result. So far, therefore, as petitioner's right to be paid depends upon any equity resulting from the receivership, or the management and disbursement of funds coming to the hands of the receiver, we can give him no relief, and can only refer him to the consideration of the circuit court at Knoxville."

Again, in *Clyde vs. Richmond etc. Co.*, 56 Fed. 542, it is said:

"This is a claim against the receivers, which can have no standing except this. The materials were furnished to one of the railroads operated under the Richmond & Danville system, and to that extent assisted in keeping the whole system a going concern. A certain amount of income was made in the operations of this system, which came into the hands of these receivers. The materials supplied by the petitioner directly or indirectly contributed to this income. The petitioner asks that she be paid out of this. It would seem that the only forum in which this claim can be decided is that in which the original proceedings under which the receivers were appointed were had. This is the circuit court of the United States for the eastern district of Virginia. *Central Trust Co. vs. East Tennessee, V. & G. R. Co.*, 30 Fed. Rep. 896. In that court an order was entered 28th June, 1892, calling upon all claimants of the rank of this petitioner to prove their claims before

special masters in Richmond, Va., by a day certain. This order was duly published in Columbia, in South Carolina. The time, it is true, has elapsed; but under well-known practice in equity permission may be given now to intervene if the fund is not distributed. At all events, as the receivers file their accounts in Virginia, and not in this district, the court there alone knows the condition of the estate, and for this reason application should be made there. *Jennings vs. Railroad Co., supra*. The petition will not be dismissed. Let it be retained, in order, if possible, to assist the petitioner in obtaining payments of her claim, which is so manifestly just."

Later, in *Finance Co. vs. Charleston, etc. R. R.*, 61 Fed. 369, Judge Simonton speaks of the practice as being "now fixed".

2. At the time this suit was brought in New York, there was pending and undetermined in this Court a petition of the receivers; that petition reported *in haec verba*, all or nearly all of the various instruments by which the Western Pacific and the Denver & Rio Grande are bound up together, including of course, the First Mortgage and Contract "B". This petition alleged that these relations involved so many complicated questions of law and fact, that the receivers did not feel justified in recommending any immediate action; they therefore requested six months' time to further investigate and report.

This petition, then, in legal intent, presented squarely the proposition as to whether any action should be immediately taken with reference to the Denver, or whether the receivers should be allowed ample time, that they might be sure and safe. But, after the plaintiff had notice of this petition, and before the day arrived on which it had been set for hearing, the suit in New York was commenced.

This, then, was the situation: Contract "B", by its terms, lays upon the Western Pacific the duty of its enforcement; the First Mortgage does the same thing; both instruments, however, confer upon the trustee the power of enforcement; that trustee, by its bill in equity, sets in motion the machinery of this Court, and as a result receivers are appointed; they request of the Court time to investigate before anything is done with reference to the Denver; before this Court can pass upon that request, the plaintiff elects to decide that petition for us, and files the suit in New York.

In *Gooding vs. Reid, Murdock & Co.*, 177 Fed. 678, the Court of Appeals of the Seventh Circuit says:

"Had the equity court, in pursuance of its power to issue the writ, power to enter the order appealed from, restraining the law court from proceeding with the action at law? The question, as we have already said, is not, Shall a 'Federal Court' restrain the 'State Court', but shall a court of equity restrain a court of law in taking jurisdiction in a complaint, by

a party to the equity suit, that one of the processes of the court of equity, issued against him, was wrongfully issued, and undertaking to redress that wrong? The question has been up in England in *Aston vs. Heron*, 2 My. & K. 390, 39 Eng. Reprint, 393, and in *Frowd vs. Lawrence*, 1 Jac. & W. 656. In the first of these cases, Lord Brougham, Lord Chancellor presiding, speaking to the question above stated, says:

‘The court excludes all other jurisdiction in everything relating to its process, not only preventing any other court from judging whether or not its orders were regular, but from examining into the regularity of their execution; and not only preventing such examination, but shutting out redress at any hands but its own, where a wrongful act is admitted to have been done under color of obeying its commands. It assumes to be the only judge of all that regards the issuing and the execution of its own orders. Whether or not it be necessary that the court should enjoy this jurisdiction, and have the power of enforcing it, exclusive of all interference, even where its orders cannot be said to have been obeyed, but rather have been colorably used as a pretext for wrong doing, it is now too late to inquire. The question has been settled long ago.’

And in the second of these cases, speaking to the same question, Eldon, Lord Chancellor, says:

‘In this case an attachment, under which the defendant was taken up, issued regularly, and, upon his application it was afterwards discharged, with costs. No application was made to this court, to visit the proceeding upon the parties concerned; but the defendant, after the attachment is discharged, brings an action at law for damages, and a motion is now made to me for an injunction to restrain him, *brevi manu*, from going on with it. I need not point out the importance of the question, because it is one between this court and the right of the subject to ask of a jury, whether he is not entitled to damages for being deprived of his liberty. It was stated that there was a case in Vernon, in which it had been expressly laid down that the court would not permit such an action to go on. That was a very strong case. The ground there taken was, that the court would not suffer its process to be examined by any other court; and that a court of law could know nothing of it.’

* * * * *

‘But this does not mean, that the persons concerned will not be obligated to make the party satisfaction; only that it must not be done by an action at law. It is impossible, from the nature of the thing, that they can try the regularity of an attachment in a court of law. The injunction must be, without prejudice to any application that the defendant may be ad-

vised to make for compensation, or the costs at law.'

The reference of Lord Brougham, to the question as one settled 'long ago', and now 'too late' to inquire into, is a reference probably, at least in its origin, to the celebrated contest between Lord Chief Justice Coke and Lord Chancellor Ellesmere, in the time of James I, as to whether a court of equity could restrain a judgment at law in which, as stated in Vol. 1, p. 5, Ames' Selection of Cases in Equity Jurisdiction, foot note, 'Lord Ellesmere's triumph was complete!'

In this country, in *Mackay vs. Blackett*, 9 Paige, Ch. (N. Y.) 437, Walworth, Chancellor, speaks as follows:

'It (the court), must restrain of course; otherwise it permits its own orders to be rescinded and its jurisdiction to be questioned—its orders to be rescinded indirectly and not by the Superior Court of Appeal; its jurisdiction to be questioned by courts of inferior or co-ordinate authority.'

Also *Reynolds vs. Corp.*, 3 Caines (N. Y.) 268, (Chief Justice Kent).

And in Foster's Federal Practice (Third Edition), Vol. 1, Sec. 263, treating specifically of the practice in obtaining the writ of *ne exeat*, the author concludes:

'The discharging order usually enjoins the defendant from bringing an action of false imprisonment (citing *Darley vs. Nicholson*, 2 Dr. & War. 86); and the prosecution of such an action may be restrained by a subsequent order (same citation).'

This is sufficient authority, it seems to us, to settle the question in favor of the court of equity's right to enjoin. Upon principle the right ought to exist. It does not deny to the person against whom the process has been issued, his right to redress; for, contrary to the wrong sued upon in the ordinary action for false imprisonment, the party has redress in the court that issues the process. There is no need, therefore, that he have the right to bring an action for false imprisonment. On the other hand, the need is imperative that a court of equity, issuing process in furtherance of its purposes, and within its jurisdiction, shall not be hampered by collateral inquiry, in other courts, as to the legality of such process, or the sufficiency of the grounds upon which it was issued. For conflicts of that kind, proceeding with varying fortunes in the different courts, besides weighing litigation with additional expense, can result only in making those things uncertain that ought, at every stage of the proceeding, to be capable of being reduced to certainty. Equity courts, subject to such procedure, would no longer be the masters of their writs."

The plaintiff could have come into this case, and presented any reasons it may have had, why the receivers should not be given the time they asked, or why proceedings against the Denver should be taken at a stated time, or in a certain manner. But it certainly could not constitute itself the sole judge, and proceed to put in litigation in a foreign jurisdiction, the very matters which the receivers had presented to this Court as worthy of more mature examination, and more deliberate judgment.

In this Circuit, the principle that a Court of Equity will enjoin a party from proceeding to try the question in a foreign jurisdiction, has been several times affirmed. For instance, in *Gage vs. Riverside Trust Co.*, 86 Fed. 984, Judge Ross enjoined the defendant from further prosecuting an action in England, saying:

‘It is not important that the shares of stock, and the written contract by which the complainant mortgaged or pledged them, together with his rights and interests in and under the contract of December 13, 1889, to the Investment Company, are, and ever since the execution of the mortgage have been situated in California, and within the jurisdiction of this court. Besides:

‘Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel

the defendant to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*.' *Phelps vs. McDonald*, 99 U. S. 298, 308; *Cole vs. Cunningham*, 133 U. S. 119, 10 Sup. Ct. 269.

The suggestion that the granting of the injunction asked for may enable the statute of limitations to run against the Investment Company's rights under the mortgage is without force, for several reasons. In the first place, it is not now sought to compel the defendant Investment Company to dismiss its suit in the high court of justice of England, but only to enjoin it from prosecuting that suit during the pendency of this prior suit. In the second place, as it is a fact conceded by the pleadings on all sides that the pledged or mortgaged property is held by the Investment Company as security for money loaned by it to the complainant, that company could not be compelled to surrender the security without full payment of its debt, even though the statute of limitations had fully run in the complainant's favor. *Whitemore vs. Savings Union*, 50 Cal. 150; *Grant vs. Burr*, 54 Cal. 300; *Spect. vs. Spect.*,

88 Cal. 437, 26 Pac. 203. In the third place, the complainant would be estopped by the allegations and prayer of his bill of complaint from setting up the statute of limitations in bar of his admitted and alleged indebtedness. *Railroad Co. vs. Howard*, 13 How. 335, 336; *Bowen vs. Stribling* (S. C.) 24 S. E. 986; 2 Herm. Estop & Res Adj. 912. The power of a court of chancery, in a proper case, to restrain persons within its jurisdiction from prosecuting suits in other courts, foreign or domestic, is well settled. In *Lord Portarlington vs. Soulby*, 3 Myln & K. 104, 106, Lord Chancellor Brougham reviews the history of the jurisdiction to restrain parties from commencing or prosecuting actions in foreign countries, and concludes:

‘Nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court.’ *Earl of Oxford Case*, 1 Ch. R. 1, 2 White & T. Lead. Cas. Eq. 316.

Mr. Justice Story states the principle thus:

‘But, although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore,

both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them, by injunction, to proceed no further in such suit. In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*.

* * * It is now held, that, whenever the parties are resident within a country, the courts of that country has full authority to act upon them personally, with respect to the subject of suits in a foreign country, as the ends of justice may require, and, with that view, to order them to take, or omit to take, any steps and proceedings in any other court of justice, whether in the same country, or in any foreign country.' Story, Eq. Jur., Secs. 899, 900.

See also, *Dehon vs. Foster*, 4 Allen 550; *Massie vs. Watts*, 6 Cranch 158; *Cole vs. Cunningham*, 133 U. S. 118, 10 Sup. Ct. 269; *Phelps vs. McDonald*, 99 U. S. 298; Beach, Mod. Eq. Prac., Secs. 763, 764.

The proposition that the court which first acquires jurisdiction of a cause and of the

parties thereto will hold and maintain it, in order to settle and end the controversy, does not admit of question. From the views expressed, it results that the injunction asked for should be granted, and it is so ordered."

XV.

Where a Court has acquired jurisdiction of a controversy it will enjoin any party from litigating any phase of that controversy in another jurisdiction.

In *Moran vs. Sturges*, 154 U. S. 256, the Supreme Court sums up the result of the authorities as follows:

"It will be perceived that the principle invoked in such cases as *Gaylord vs. Fort Wayne, M. & C. R. Co.*, *Home Ins. Co. vs. Howell*, *supra*, is, that courts, for the purpose of protecting their jurisdiction over persons and subject matter may enjoin parties who are amenable to their process and subject to their jurisdiction from interference with them in respect of property in their possession *or identical controversies therein pending*, by subsequent proceedings as to the same parties and subject-matter in other courts of concurrent jurisdiction."

In *Ex parte Young*, 209 U. S. 123, the Supreme Court held that the Federal Courts will enjoin prosecutions in State Courts, where the question of the validity of the statute is already pending in the Courts of the United States.

In *Sharp vs. Bonham*, 213 Fed. 660, Judge Sanford reviews the authorities as follows:

“Under these circumstances the controlling question presented is whether or not the proceedings in this court prior to the institution of the suit in the Chancery Court were such as to vest in this court exclusive jurisdiction of the subject-matter of the litigation so as to deprive the state courts of any jurisdiction in regard thereto, pending the final termination of the suit in this court.

It is clear on the one hand, as a rule of substantive law, applicable as between the Federal and State courts, that the court which first acquires jurisdiction over property in controversy or the *res* which constitutes the subject matter of the suit, is entitled to retain that jurisdiction to the end of the litigation without interference from any other court whatever. 3 Street Fed. Eq. Pract., Sec. 2529, p. 1466, and cases cited in note 41. And this is more than a mere rule of comity as between the State and Federal courts; it is a ‘principle of right and law’, which so operates that when one court takes a specific thing into its jurisdiction that *res* is as much withdrawn from the judicial power of any other court as if it had been carried physically into a different territorial sovereignty. *Covell vs. Heyman*, 111 U. S. 176, 182, 4 Sup. Ct. 355, 28 L. Ed. 390.

It is equally clear, on the other hand, that the

mere fact of the pendency of two suits *in personam* between the same parties, upon the same identical cause of action, in courts of different jurisdictions, does not make a case in which the jurisdiction of one court is interfered with or impeded by the action of the other. *Stanton vs. Embry*, 93 U. S. 548, 23 L. Ed. 983; *Gordon vs. Gilfoil*, 99 U. S. 168, 178, 25 L. Ed. 383; *Hubinger vs. Trust Co.* (8th Cir.) 94 Fed. 788, 36 C. C. A. 494; *Powers vs. Building & Loan Assoc.* (C. C.), 86 Fed. 705, 708; 1 Fost. Fed. Pract. (4th Ed.) 506. In such case the pendency of the former suit *in personam* is not a matter going to the jurisdiction or ground for the abatement of the second suit, although as a rule of comity between the courts of the second court will ordinarily upon proper motion stay its proceedings until the termination of the litigation in the former court. Simk. Fed. Suit Eq. (2d Ed.) 410. But in such case if such stay is not had, and if final judgment be rendered first in the court in which the proceedings were later instituted, such judgment will thereafter be binding as *res judicata* between the parties in the court in which the proceedings were first instituted. *Merritt vs. Steel Barge Co.* (8th Cir.), 79 Fed. 228, 24 C. C. A. 530. And see *Gates vs. Bucki* (8th Cir.), 53 Fed. 961, 965, 4 C. C. A. 116.

The precise question for determination in the present case then is whether this suit, which was brought to declare and enforce a

trust upon which the church property was held, and in which the trustees holding title to the property were made party defendants and brought before the court, is to be deemed as falling within the rule applicable to suits where the *res* is in the actual possession of the court, on the one side, in which case its jurisdiction remained exclusive until the determination of the litigation, or whether, on the other hand, it is to be deemed analogous to a mere suit *in personam*, in which this court had not exclusive jurisdiction and in which the prior judgment in the State courts should be held conclusive as to the rights of the present litigants through their proper class representation in the other suit.

After careful consideration of the authorities I am of the opinion that the nature of this suit is such that this court must be held to have had exclusive jurisdiction of the subject matter of the controversy even although the property involved had not been taken into its actual custody. In *Powers vs. Building & Loan Assoc.* (C. C.), *supra*, Judge Lurton (now Mr. Justice Lurton), said (86 Fed. at page 707) :

‘The principle that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be interfered with by process out of another court, is well settled. *Buck vs. Colbath*, 3 Wall. 334 (18

L. Ed. 257); *Krippendorf vs. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27 (28 L. Ed. 145); *Byers vs. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906 (37 L. Ed. 867); *Compton vs. Railroad Co.*, 31 U. S. App. 486, 523, 530, 15 C. C. A. 397, 68 Fed. 263. There are two classes of cases in which the court first obtaining jurisdiction should be suffered to proceed without any interference by process from another concurrent jurisdiction. The first class consists of those cases in which the exercise of jurisdiction by one court will interfere with the prior possession of the *res* by another court of competent and concurrent jurisdiction. *Krippendorf vs. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27 (28 L. Ed. 145); *Heidritter vs. Oilcloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135 (28 L. Ed. 729); *Byers vs. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906 (37 L. Ed. 807). The second class is where there are two suits pending in different courts of concurrent jurisdiction, in which the parties are the same, and which involve and affect the same subject-matter, and where the jurisdiction of neither is complete nor effectual unless it may, if necessary or proper, exercise exclusive dominion over the *res* in litigation. The cases relied upon by counsel for defendants of *Gates vs. Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961; *Merritt vs. Barge Co.*, 24 C. C. A. 530, 79 Fed. 228; *Zimmerman vs. So Relle*, 25 C. C. A. 518, 80 Fed. 417; and *Sharon vs. Terry* (C. C.), 36 Fed. 337—are cases belonging to the latter class.

The conflict exists in such instances because the suits are in the nature of suits *in rem*.'

In *Illinois Steel Co. vs. Putman* (5th Cir.), 68 Fed. 515, 517, 15 C. A. C., 556, 558, the court said in language which is cited with approval in 3 Street, Fed. Eq. Pract., Sec. 2534, p. 1470:

'Where a bill in equity brings under the direct control of the court all the property and estate of the defendants, or of certain named defendants, or certain designated property of all or either of the defendants, to be administered for the benefit of all entitled to share in the fruits of the litigation, and the possession and control of the property are necessary to the exercise of the jurisdiction of the court, the filing of the bill and service of process is an equitable levy on the property, and pending the proceedings, such property may properly be held to be in *gremio legis*. The actual seizure of the property is not necessary to produce this effect, where the possession of the property is necessary to the granting of the relief sought. In such cases the commencement of the suit is sufficient to give the court, whose jurisdiction is invoked, the exclusive right to control the property. *Adams vs. Trust Co.*, 66 Fed. 617 (15 C. C. A. 1).'

In *Merritt vs. Steel-Barge Co.* (8th Cir.), 79 Fed. 228, 231, 24 C. C. A. 530, 533, the court said:

'The doctrine is well settled that when a court,

in the progress of a suit properly pending before it, takes possession of the property, either under a writ of replevin or attachment or by other mesne or final process, or by the appointment of a receiver or assignee, its jurisdiction over the property for the time being becomes exclusive, and no other court can lawfully interfere with the possession so acquired. While property is so held it cannot be sold under the judgment, sentence, or decree of any other tribunal. Moreover, so long as the property remains in *custodia legis*, no other court, unless by special leave of the court which first acquired jurisdiction, can lawfully proceed with the trial and determination of a suit the object of which is to establish a lien against the property, or to subject the specific property to the payment of debts, or which may result in creating conflicting rights or titles thereto. The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. *Freeman vs. Howe*, 24 How. 450 (16 L. Ed. 749); *Peck vs. Jenness*, 7 How. 612, 624, 625 (12 L. Ed. 841); *Taylor vs. Carryl*, 20 How. 583, 597 (15 L. Ed. 1028); *Wiswall vs. Sampson*, 14 How.

52 (14 L. Ed. 322); *Covell vs. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355 (28 L. Ed. 390); *Heidritter vs. Oilcloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135 (28 L. Ed. 729); *Riggs vs. Johnson Co.*, 6 Wall. 66, 196 (18 L. Ed. 768); *Central Trust Co. of New York vs. South Atlantic & O. R. Co.* (C. C.), 57 Fed. 3. The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of litigation, the court may be compelled to assume possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end, without interference or hindrance on the part of any other court. And this rule, in its application to federal and state courts, being the outgrowth of necessity, is 'a principle of right and of law,' which leaves nothing to the discretion of the court, and may not be varied to suit the convenience of litigants. *Gates vs. Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961; *Chittenden vs. Brewster*, 9 Wall. 191 (17 L. Ed. 839); *Orton vs. Smith*, 18 How. 263, 265 (15 L. Ed. 393); *Union Trust Co. vs. Rockford, R.*

I. & St. L. R. Co., 6 Biss. 197, 24 Fed. Cas. 704; *Owens vs. Railroad Co.* (C. C.), 20 Fed. 10; *Union Mut. Life Ins. Co. vs. University of Chicago* (C. C.), 443.'

And see *Adams vs. Mercantile Trust Co.* (5th Cir.), 6 Fed. 617, 620, 15 C. C. A. 1.

And in *Farmers' Loan Co. vs. Railroad Co.*, 177 U. D. 51, 61, 20 Sup Ct. 564, 568 (44 L. Ed. 667), in which it was held that as between the same parties in a proceeding *in rem*, exclusive jurisdiction must be regarded as attaching when the bill was filed and process had been issued, the court said:

'The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the

court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to Federal and State courts. *Peck vs. Jenness*, 7 How. 612 (12 L. Ed. 841); *Freeman vs. Howe*, 24 How. 450 (16 L. Ed. 749); *Moran vs. Sturgess*, 154 U. S. 526 (Sup. Ct. 1019, 38 L. Ed. 981); *Central Bank vs. Stevens*, 169 U. S. 432 (18 Sup. Ct. 403, 42 L. Ed. 807); *Harkrader vs. Wadley*, 172 U. S. 148 (19 Sup. Ct. 110, 43 L. Ed. 399).'

Applying the rule laid down in the foregoing authorities I am of opinion that this suit, being brought to declare and enforce a trust in real property and being one in which the trustees holding title to the property were brought before the court by service of process, and in which in the progress of the litigation the court might be compelled to assume possession and control of the property to be affected, must be deemed a suit in the nature of a suit *in rem* in such sense that upon the filing of the bill and the issuance and service of the process the exclusive jurisdiction of this court attached, and that it must be held to have retained such exclusive jurisdiction to determine the subject matter of the controversy until the termination of this litigation."

It is equally well settled, that equity will enjoin another action, when the remedy is more complete in the pending action.

Joyce on Injunctions, Sec. 576.

XVI.

The argument of the respondent fails, because the proposed injunction is not directed toward restraining the plaintiff from bringing some other action, but toward restraining it from further prosecuting the action already brought.

1. The argument of plaintiff is based upon the proposition that one part of Contract B gives it this right of action, entirely irrespective of any earnings of the Western Pacific. But the dependent bill is framed on no such theory. The allegations in that bill of complaint (Section 7 thereof), are as follows:

The Old Denver Company and the Rio Grande Western Company, jointly and severally, covenanted and agreed with the Western Pacific Company and with the Trustee under the Western Pacific Company's First Mortgage as aforesaid, to pay semi-annually to the Trustee of said mortgage, beginning February 26, 1909, and continuing until all of the bonds secured by the Western Pacific Company's First Mortgage should be fully paid, principal and interest, such sum of money as should be necessary *in addition to the earnings of the Western Pacific Company* and other moneys actually and lawfully appropriated by it for the purpose, to meet the interest and sinking fund payments upon the issue of bonds secured by the said First Mortgage, and provided for therein, promptly and at the time and place stipulated in the said

mortgage, and to pay any taxes which the Western Pacific Company might be required or permitted to pay thereon or to deduct therefrom,

And again (Section 13 thereof) :

That by and according to the terms of the said Contract B, the companies there promising now the defendant the New Denver Company, became bound to pay unto the Trustee under the Western Pacific Company's First Mortgage, from and after September 1, 1908, or the earlier acquisition or completion of the Western Pacific Company's main line of railroad from San Francisco to Salt Lake City, in such amount as would, together with the amount actually and lawfully appropriated by the Western Pacific Company out of its earnings and other income, and by it paid over to its fiscal agent in the City of New York or its fiscal agent in the city of San Francisco, or both of them, for the purpose of paying the interest to fall due during the then current calendar half year upon the Western Pacific Company's First Mortgage bonds upon which interest should be payable, be sufficient to pay all such semi-annual installment of such interest; and such further amount as would, together with the amount actually and lawfully appropriated by the Western Pacific Company out of its earnings and other income, and by it paid over to the mortgage trustee for the purpose of meeting the sinking fund payment, if any, required by said mortgage to be

made by the Western Pacific Company during the then current calendar half year, be sufficient to meet such sinking fund payment.

And again (Section 17 thereof) :

That by reason of the uncertainty as hereinbefore set forth as to the amount of earnings of the Western Pacific Company from time to time heretobefore or hereafter applicable to said sinking fund payments or hereafter to said interest instalments, your orator is not informed as to the exact amount for which the defendant the New Denver Company is liable under the terms of said Contract B, in respect either of payments due from time to time to the said sinking fund or for said instalments of interest or by reason of the breach of said contract as a whole; that the true amount thus due and the true amount of such liability can appear only upon an accounting to be had under the direction of this Honorable Court ascertaining the amount of such earnings so applicable and the amount of deficiency therein for which the defendant the New Denver Company is liable as aforesaid; and that also, in view and because of the various defaults of the New Denver Company, hereinbefore set forth, that Company is liable to your orator for a total or gross sum in liquidation of its total future liability under said Contract B and also under the said guaranties but that such total or gross sum can only be ascertained and fixed by an accounting and

adjudication by this Honorable Court proceeding in due course upon equitable principles. That your orator is informed and believes that adverse claims in respect of the amount earned and the amount due are made by the defendant the Western Pacific Company and the defendant the New Denver Company, which can be resolved and determined only on such an accounting as aforesaid, to which both of the said companies shall be parties, and that the defendant the New Denver Company is liable herein for the amount of the deficiency appearing upon such an accounting in respect of the said sinking fund payments, of the said interest payments, and the amount fixed in respect to the future liability of said defendant. .

It is thus clear that the bill is framed upon the theory that the liability of the Denver and Rio Grande is dependent entirely upon the earnings of the Western Pacific—in other words, upon the theory that the liability of that company is represented by the difference between what the Western Pacific may earn, and the amount of the interest and sinking fund. If the plaintiff had adopted the theory of counsel on their oral argument of the brief, namely: that the Denver and Rio Grande is liable for any amount not *actually paid* by the Western Pacific, and had brought action at law for the amount, the problem might have been different.

2. The dependent bill alleges that among the properties “expressly assigned and transferred by

the First Mortgage from the Western Pacific Company to the trustee under said mortgage," was Contract B. It further alleges that it has filed its bill in this Court to foreclose that mortgage. In other words, the very dependent bill itself alleges that Contract B is a part of the mortgage, and that in the suit in the California Court "your orator, as trustee as aforesaid, prayed, among other things, that said First Mortgage be foreclosed, that an account be taken, and had of the property subject to the lien of said First Mortgage, and the same decreed to be a valid and existing lien upon all railroads and property, real and personal, rights, privileges and franchises covered by and embraced in said First Mortgage, together with all additional property subject thereto. That the amount due and unpaid upon said First Mortgage Bonds for principal and interest be ascertained and determined." The situation, then, is this: the plaintiff has filed its bill in the California Court, setting up the mortgage (of which Contract B is as much a part as the Oakland terminals), and asking that this Court determine what property is subject to the lien of that mortgage, how much is due, and that the mortgage be foreclosed; then, it files this dependent bill in New York, alleging the pendency of the California suit, and asking for the enforcement of Contract B, as part of the mortgaged property.

3. The dependent bill alleges (paragraph 13) that since March 1, 1908, the Western Pacific has diverted income and earnings which should have

been applied on interest and sinking fund, and asks for an accounting of these sums. But it is clear that these sums must have been diverted to Capital account, and have become a part of the corpus of the actual property now in the hands of the receivers. If, then, it should be adjudged by the New York Court that there has been such a diversion, in violation of the terms of Contract B, then the Denver and Rio Grande may be entitled to reimbursement out of the property; at any rate, the questions as to how far there has been such a diversion, whether or not such a diversion is in violation of Contract B, and how far the Denver and Rio Grande is entitled to a credit therefor, are questions involving the title and possession of part of the property now in the hands of this Court.

4. The dependent bill alleges that the covenants of Contract B run with the railroads of the parties to that contract. In so far, at least, as they may run with the railroad of the Western Pacific, any judgment in that case may result in creating a lien upon property in possession of the receivers.

5. The dependent bill makes the Western Pacific a party, and asks for an accounting from it.

XVII.

The dependent suit in New York makes the Western Pacific a party, and asks for an accounting from it. Inasmuch as no judgment can be rendered against the Denver without an accounting from the Western Pacific, the latter is a necessary party.

It is alleged in the dependent bill that the trusts

raised by Contract "B" cannot be executed otherwise than by an "accounting and decree of this Honorable Court, as in the prayer of this bill set forth."

(Dependent Bill, Section 20.)

The prayer asks:

"That an account may be taken and had of the amount of the gross earnings and income of the Western Pacific Company during each fiscal half year, from the creation of the said First Mortgage until the time of said accounting, and of the amount of the expenses and charges incurred by and accruing against the Western Pacific Company during the said periods (including interest and the sinking fund payments falling due during said half years respectively), classified in accordance with the provisions of the said Contract B; the amounts, if any, paid by the Western Pacific Company to its fiscal agents or any of them on account of the interest to fall due, secured or evidenced by the said First Mortgage Bonds; the amount, if any, paid by the Western Pacific Company to the said Mortgage Trustee to meet the sinking fund payments required by the said First Mortgage; the amount due under the said Contract B, and under the said guaranties from the defendant the New Denver Company for interest and for payments upon the sinking fund required to be paid by it under the provisions of the said Contract B, and the said Guaranty;

the amount or sum which will remain payable upon the said Bonds and Guaranty for principal and for interest after the sale of the said Western Pacific Company's property embraced within the said suit for foreclosure, and the application of the net proceeds of said sale to the principal amount evidenced and secured to be paid by the said Bonds and Guaranty, and, in that connection, the principal sum required to be paid or to be secured to be paid by the New Denver Company in order adequately to provide for the fulfillment of its covenants for future payment and guaranty contained in the said Contract B and said guaranties."

There is also a prayer for general relief.

Now, the Western Pacific is not only made a party to this action but it is an absolutely necessary party, without whose presence no decree can be rendered.

Saloy vs. Bloch, 136 U. S. 338.

The dependent bill also alleges that no payments whatever have been made into the sinking fund, and that the Western Pacific has at various times since March 1, 1908, made and received earnings which should have been applied to that account.

(Dependent Bill, Section 13.)

A case is made out, therefore, not only for an accounting, but also for (1) a judgment against the Western Pacific for the amount which has been diverted from earnings to other purposes than those specified in Contract "B"; (2) a decree of segrega-

tion and sale of the Western Pacific's property to satisfy that judgment; and, (3) a decree for the application of funds in the hands of the receivers to a reduction, *pro tanto*, of any judgment against the Denver.

It is, of course, elementary, that under the prayer for general relief, a Court of Equity will render any decree consistent with the allegations of the bill.

Foster's Federal Practice, Vol. I, Section 83.

It is equally elementary that a Court of Equity will enforce the collection of the amount found due on an accounting by segregation and sale.

Moore vs. Calkins, 85 Cal. 177.

Likewise, under the pleadings, the Court in New York *must* render a judgment for an accounting from the Western Pacific. But the very order appointing the receivers puts in their hands all the accounts, books and records of the Company. A decree for an accounting, therefore, must of necessity operate against these records; moreover, it must operate *in personam* against the receivers themselves, for the reason that the person in possession of the accounts is *ex necessitate* compellable by process to produce them.

Moreover, there is no doubt of the principle that when Equity takes jurisdiction for an accounting, it will retain the whole case, and settle the whole controversy, even to the extent of adjudicating matters of purely equitable cognizance.

Patterson vs. Glassmire, 166 Pa. St. 230;

Rathbone vs. Warren, 10 Johns. (N. Y.) 587.

Accordingly, the accounting would undoubtedly show:

(a) That a considerable amount of money has been diverted from current earnings to Capital account;

(b) That the receivers will have on hand considerable money derived from current earnings.

(a) Now this money, which has been diverted to Capital account is in possession of the receivers, in that it has been expended for betterments, for improvement of the road and equipment such as the Arnold Loop and the oil cars. Some of that money, notably \$130,000, is actually in the hands of the receivers in cash. Now, under the principles mentioned above, the New York Court in the dependent bill would have plenary power to determine whether or not this money should be applied to the sinking fund, and to direct its application accordingly. In this connection, it will be noted that the prayer of the dependent bill specifically asks that the "Court find and declare the true meaning, construction and effect of said Contract B in respect of sinking fund payments thereby required to be made."

Furthermore, this matter involves another consideration peculiarly within the cognizance of the Court of primary jurisdiction, and that is the question of the application of these diverted funds to the satisfaction of preferential claims.

Southern Ry. Co. vs. Carnegie Steel Co., 176
U. S. 257.

(b) The Receivers have cash on hand, not only from earnings since the receivership, but also from money earned prior to their appointment, and collected since. As to money earned prior to their appointment, the question is before this Court as to whether that is to be applied to preferential claims. Moreover, the receivers are obliged, from time to time, and under orders of this Court, to expend money for necessary betterments. But in the event that the New York Court should decide that these funds should be applied strictly to purposes provided by Contract "B," a conflict would arise which could only result in hopeless confusion.

XVIII.

The Denver and Rio Grande Railroad Company is an indispensable party to this action to foreclose.

"It is a general rule in equity that all persons materially interested, either legally or beneficially, in the subject matter of the suit, are to be made parties to it either as plaintiffs or as defendants, so that there may be a complete decree which shall bind them all."

The above language is quoted from Story's Equity Pleading, Section 72, by the Supreme Court in *Gregory vs. Stetson*, 133 U. S., 588.

Mr. Beach, in his work on modern equity practice, Vol. I, Sec. 55, quotes the following language from *Chadbourne's Executors vs. Coe*, 10 U. S. App. 83:

“The Supreme Court of the United States divide parties to suits in equity into three classes; first, formal parties; second, necessary parties; third, indispensable parties. Formal parties are those who have no interest in the controversy between the immediate litigants, but have an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation. They may be parties or not at the option of the complainant. Necessary parties are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Such persons must be made parties if practicable in obedience to the general rule which requires all persons to be made parties who are interested in the controversy in order that there may be an end of litigation; but the rule in the federal courts is that if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may proceed to a final decree between the parties before the court, leaving the rights of the absent parties untouched, to be determined in any competent forum. * * *

Indispensable parties are those who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either

affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

In this Circuit, the Court of Appeals in *Consolidated etc. Co. vs. San Diego*, 93 Fed. 851, quotes the above language from *Gregory vs. Stetson*, and says:

"From this brief reference to the allegations of the bill, it will readily be seen that the San Diego Water Company has an interest in the subject-matter of the suit, and that any decree that might finally be rendered therein would affect its interest. It is certainly interested in obtaining the relief sought for by the complainant, and would doubtless be entitled, in its own behalf, if so disposed, to bring a suit in its own name, and litigate the same question, in a competent court. Its presence is necessary to a full and complete determination of the questions in controversy in this suit. To determine some of the questions raised by the bill as to the reasonableness of the rates fixed by the ordinance, it will involve an investigation of the management of the affairs of the company. In *Shields vs. Barrow*, 17 How. 130, 139, indispensable parties are described as 'persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final

termination may be wholly inconsistent with equity and good conscience.' See also, *Barney vs. Baltimore City*, 6 Wall. 281, 284; *Cunningham vs. Railroad Co.*, 109 U. S. 446, 456, 3 Sup. Ct. 292, 609; *Cattle Co. vs. Frank*, 148 U. S. 603, 13 Sup. Ct. 691."

It would seem clear that no decree can be entered in this case which will not affect the Denver and Rio Grande: (1), because it is elementary that the decree *nisi* must direct the terms upon which the property of the Western Pacific shall be sold—that is, either burdened by, or free from the covenants of Contract "B"; (2) because the final decree must direct how the proceeds of the sale are to be distributed. This involves a construction of that portion of the First Mortgage to the effect that money derived from a sale shall be applied "without preference or priority of principal over interest or of interest over principal."

First Mortgage, Article V, Sec. 10.

Section 10: The purchase money, proceeds or avails of any sale of the mortgaged and pledged premises and property, together with any other moneys which may then be held by the Trustee or be payable to it under any of the provisions of this indenture as part of the trust estate, shall be applied as follows:

First: To the payment of the costs, expenses, fees and other charges of said sale, and a reasonable compensation to the Trustee, its agents

and attorneys, and to the payment of all expenses, liabilities and advances incurred or disbursements made by the Trustee, and to the payment of all taxes, assessments or liens prior to the lien of these presents, except any taxes, assessments or other superior liens subject to which such sale shall have been made.

Second: To the payment of the whole amount due, owing or unpaid upon the bonds hereby secured for principal and interest, with interest on the overdue installments of interest at the rate of five per cent. per annum, and, in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest without preference or priority of principal over interest or of interest over principal or of any installment of interest over any other installment of interest, ratably, according to the aggregate of such principal and to the accrued and unpaid interest.

Third: Any surplus then remaining to the Railway Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

The Denver, of course, is vitally interested in this distribution of the funds, because its liability, *pro tanto* depends upon it; (3) because the decree *nisi* must fix the upset price, and upon that price is very apt to depend the amount of the deficiency

judgment, and therefore the amount of the Denver's future liability.

But the property of the Western Pacific is tied up to the Denver and Rio Grande in other matters which are vital to both roads:

1. Is the Western Pacific to be sold, subject to those provisions of Contract "B" which make it, so far as traffic is concerned, a mere extension of the Denver and Rio Grande? When the receivers, or the referee, or the special master offer it for sale from the auction block, that is the first thing a prospective bidder will inquire about. On the one hand, it is likely that the Union Pacific, or the Chicago & Northwestern, or the Burlington, might hesitate to bid for a property which was bound to deliver all its traffic to the Denver. On the other hand, an independent bidder might hesitate to buy a road which ends at Salt Lake, and with no traffic arrangements to the East. So that the decree *nisi* in directing a sale, must direct whether or not the property is to be sold, subject to Contract "B," or freed from it—and the Denver is a necessary party to the determination of that question.

2. In the same manner, the Western Pacific, by Contract "C," is tied up to the Missouri Pacific, through the Denver and Rio Grande. The parties to Contract "C" are the Missouri Pacific and the Denver and Rio Grande. It provides that the two parties shall deliver, each to the other, all traffic originating on the roads; and in addition, the Den-

ver agrees to deliver to the Missouri Pacific, all traffic originating on the Western Pacific.

This contract further provides:

And whereas, the railway line of said Pacific Company hereinbefore mentioned will, when completed from San Francisco to Salt Lake City, furnish a new outlet to the Pacific Coast for west-bound traffic carried by the parties to this agreement, and said Pacific Company will then be in a position to make substantial contributions of east-bound traffic for the said joint through line hereinabove provided for; and,

Whereas, the Pacific Company has entered into a traffic agreement with the Denver Company and the Western Company for the establishment and maintenance of a joint through line over their several connecting railways between San Francisco on the west and Pueblo on the east, but upon the express understanding that the Missouri Company and the Denver Company shall simultaneously enter into this agreement; and,

Whereas, the Pacific Company, for the purpose of raising capital wherewith to complete and equip its said railway, has authorized an issue of Fifty Million Dollars of its First Mortgage Five Per Cent. Thirty-Year Gold Bonds, and has secured the same by Mortgage to Bowling Green Trust Company, Trustee, the same bearing date Sept. 1st, 1903; and,

Whereas, the establishment and the continued and effective maintenance of the traffic relations established by this agreement between the Missouri Company and the Denver Company, parties hereto, are of substantial benefit and advantage to the Pacific Company by reason of the railway connection as aforesaid at Salt Lake City and by reason of the traffic agreement aforesaid between the Denver Company and the Western Company on the one hand, and the Pacific Company on the other; and,

Whereas, the establishment and the continued and effective maintenance of the traffic relations established by said hereinbefore recited agreement between the Denver Company and the Western Company on the one hand and the Pacific Company on the other hand, are of substantial benefit and advantage to the Missouri Company by reason of the furnishing of additional business for the joint line of the Denver Company and the Missouri Company created by this agreement;

Now therefore, in further consideration of the premises and of the mutual covenants and agreements herein set forth, it is hereby further covenanted and agreed by and between the parties to this agreement, to wit, the Missouri Company and the Denver Company, as follows:

1. This contract is made not only for the mutual benefit of the parties hereto, but also for

the benefit of Western Pacific Railway Company, being the Pacific Company aforesaid.

2. The Pacific Company having a beneficial interest in this contract and in the continuance of operations thereunder, said Company, and its successors and assigns, shall have the right to enforce specific performance of this agreement and of each and every part thereof (whatsoever the nature of any provision thereof may be), for and during the entire term hereinafter provided.

3. The said traffic contract between the Denver Company and the Western Company of the one part, and the Pacific Company of the other part, and the continuance of operations thereunder being of substantial benefit and advantage to the Missouri Company, said Missouri Company and its successors and assigns shall have the right to enforce specific performance of said agreement and of each and every part thereof for and during the entire term thereof; but nothing in this section contained shall be taken to authorize any action that shall have the effect of impairing in any manner or to any extent the lien or security of said First Mortgage of the Pacific Company or of preventing, obstructing or interfering with the exercise of any of the remedies thereby granted to the Trustee, or to prevent the modification or termination of said traffic contract in the manner therein provided therefor or to impair or

qualify the right of the Denver Company to enter into any agreement, in its own absolute discretion, abrogating, or modifying any provision or provisions thereof in accordance with the provisions in that behalf therein contained.

4. All of the rights of the Pacific Company under this agreement may by said Pacific Company, be effectively pledged by assignment thereof to Bowling Green Trust Company, Trustee, under the first mortgage of the Pacific Company.

5. The Trustee for the time being under the said first mortgage of the Pacific Company, at all times, both prior to and after default under said mortgage, shall have the right to enforce specific performance of this agreement, and each and every part thereof, by each and both of the parties thereto, and to enforce this agreement by suits in equity or actions at law or otherwise as it may deem appropriate from time to time.

6. This contract shall be and continue in full force and effect from the date of executing the same and until all of the Fifty Million Dollars of First Mortgage Five Per Cent. Thirty-Year Gold Bonds of the Pacific Company, principal and interest, shall be fully paid, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided in the First Mortgage of said Pacific Company, and this said

contract shall run with the railways of each and both of the parties hereto and shall accrue to the benefit of and be binding upon them and their respective successors and assigns."

It will be remembered, that this contract was one of those referred to in the preliminary agreement between the Denver and the Western Pacific, and was specifically pledged under the First Mortgage. So that, if and when the road is sold, the interlocutory decree must determine whether it is to be delivered free from Contract "C," or bound by it. And in the determination of *that* question, both the Denver and the Missouri Pacific are necessary parties.

3. By the provisions of Contract "A," the Denver agrees by the purchase of second mortgage bonds, to furnish the money necessary to complete and equip the Western Pacific. So far as the completion of the road is concerned, this contract was carried out. But it was certainly never carried out as to equipment. The schedule attached to, and made a part of Contract "A," reads:

Equipment:

"This will consist of locomotives of different classes, modern design and best construction. Also cars of various classes and modern design for passenger train service, and cars of various classes and suitable design for freight service, the aggregate cost of the Equipment being not less than \$3,000,000."

But the Western Pacific owns no passenger cars at all, and practically no freight equipment. It is supplied with both passenger and freight cars by the Denver, under leases, by which the Western Pacific pays large rentals. Now, Contract "A" is also pledged under the First Mortgage; it is an asset in the hands of the receivers; and there is a grave question, as to whether or not the Denver is not compellable to provide both passenger and freight cars; or at least, an involved accounting is necessary of the proceeds of the Second Mortgage bonds—and again the Denver is a necessary party.

(See Report of Receivers' Ex. "H," "I" and "J.")

4. The freight terminals used by the Western Pacific in Salt Lake, are the property of the Denver and Rio Grande. These terminals are held under a lease, which is to run as long as the First Mortgage bonds are unpaid. This lease is also pledged to the Trustee under the First Mortgage. Again, if the property is to be sold, it is necessary to determine whether it is to be sold subject to this lease, and the Denver is a necessary party to the determination of that question.

(See Receivers' Report, Exhibit "G.")

5. The passenger terminals in Salt Lake City belong to a separate corporation, the Salt Lake City Union Depot and Railroad Company. They consist of an imposing and convenient union depot, and extensive and commodious yards. The stock of this corporation is owned by the Western Pacific and the

Denver, the latter owning one share more than the former. This Depot Company has an outstanding bond issue, of which the Bankers' Trust Co. is trustee. There is a contract between the Denver and the Western Pacific, by which each pays one-half the interest on the bonds, as well as other expenses. This agreement is pledged under the Deed of Trust of the Depot Company, and the Denver and the Western Pacific; each guarantee one-half of the interest on its bonds.

(See Receivers' Report, Exhibits "K" to "P.")

So that, under these arrangements, it must be determined: (a), whether or not the property of the Western Pacific is to be sold subject to this lease; (b), how far the Western Pacific's guaranty of the bonds or the Depot Company is a lien on its property; (c), the rank of that lien, if it exists, *and the highly important and interesting questions as to whether or not this guaranty of one-half of the interest on the Depot Company's bonds takes precedence over the lien of the Western Pacific's First Mortgage; and whether or not the Denver is not bound by Contract "B" to pay this, as a necessary operating expense.*

In any event, it makes the Denver, again, a necessary party.

6. In February, 1910, another contract was entered into between the Denver and the Western Pacific. It reiterates Contracts "A" and "B," and agrees to continue to supply sufficient money to fully carry out the provisions of those documents. This

latter contract, however, recognizes that inasmuch as the capital stock of the Western Pacific is only \$75,000,000.00, that it cannot lawfully create any indebtedness above that amount. However, it was already indebted \$50,000,000.00 on the First Mortgage Bonds, and \$25,000,000.00 on the Second Mortgage. Accordingly, by this contract, it was agreed that moneys advanced by the Denver should not constitute a "present indebtedness," but should only become a debt when the capital stock should be increased.

(See Receivers' Report, Exhibit "Q.")

Now, the effect of this agreement upon the Western Pacific, is also of great importance from two points of view:

1. It reiterates the covenant to make up all sums necessary under both Contracts "A" and "B";
2. It postpones any claim for sums so advanced, until the Western Pacific can lawfully create the indebtedness.

Under Contract "A," the Denver agreed to purchase the entire issue of \$25,000,000.00 Second Mortgage bonds at 75, in order to provide money for the completion and equipment of the road. In order to consummate this transaction (as well as to raise other moneys), the Denver created its First and Refunding Mortgage, as security for an authorized issue of \$150,000,000.00 Five per cent. bonds. Then in August of the same year (1908), the Denver and the Western Pacific made an agreement with the

Bowling Green Trust Company by which \$10,863,000 of the Western Pacific's Second Mortgage Bonds were pledged as security for the Denver's First and Refunding Bonds; this transaction, as this latter agreement shows, was in furtherance of a contract between the Denver and three New York banking firms, Blair & Co., Solomon & Co., and Read & Co., by which the bankers purchased the Denver's convertible notes in the sum of \$10,000,000 and took as security \$15,000,000.00 of the Denver's First and Refunding Bonds. The money realized from these notes was largely used by the Denver in the purchase of Western Pacific Second Mortgage Bonds. Sec. 7 of this contract specifically recognizes the existence of Contract "B".

(See Report of Receivers, Exhibit "R.")

In July, 1909, the Denver and the Western Pacific entered into a further contract with the Equitable Trust Company. This contract recites that *by its very terms* the Denver's First and Refunding Mortgage provides that \$23,000,000.00 of the bonds secured by it may be used to purchase Western Pacific Bonds in accordance with Contract "A". This agreement provides that \$6,100,000.00 further Western Pacific Second Bonds shall be deposited with the trustee of the Denver's First and Refunding Mortgage.

(See Report of Receivers, Exhibit "S.")

Then, in May, 1912, the Denver created its Adjustment Mortgage, as security for an authorized issue of \$25,000,000 seven per cent bonds. This

mortgage, by its terms, recognizes the liability of the Denver under Contract "B".

It would seem then, that purchasers of the Denver's First and Refunding Fives and its Adjustment Sevens, had ample notice of its obligations to the Western Pacific; to the determination of that vital question, affecting the ranks of the lien of Contract "B", the Denver is also a necessary party.

In this connection with the general proposition, the language of the Supreme Court in *Caldwell vs. Taggart*, 4 Pet. 190, is most pertinent:

"In reply to all these grounds of reversal, for want of parties, or for want of due maturation for a final hearing, it has been urged that nothing is ordered to be mortgaged or sold beside Caldwell's own interest, whatever that may be. But this we conceive to be an insufficient answer. It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decrees should terminate and not instigate litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has the means of reducing every right to certainty and precision, and is therefore bound to employ those means in the exercise of its jurisdiction.

There is no want of learning in the books on the subject. The general rule is laid down thus:

‘However numerous the persons interested in the subject of a suit, they must all be made parties plaintiff or defendants, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit to make the performance of the order perfectly safe to those who have to obey it, and to prevent further litigation’. And again, ‘all persons are to be made parties who are legally or beneficially interested in the subject matter and result of the suit’, extending in most cases to heirs-at-law, trustees and executors.

Thus, in a case in which a remainderman in tail brought a bill against the tenant for life to have the title deeds brought into court, and there were annuitants on the reversion, and a child interested under a trust term of years prior to the limitation to the plaintiff—that is, incumbrances prior and posterior to the plaintiff,—Lord Hardwicke (3 Atk. 570), refused a decree without first making them parties. So, where husband tenant for life, remainder to his wife for life, remainder over, brought his bill without joining the wife, the objection was made and sustained on the ground that if there was a decree against the husband, it would not bind the wife. (1 Atk. 289.)

So, if an under mortgagee brings his bill to

foreclose the original mortgagor, he must make the first mortgagee a party. (3 P. W. 643.) This is the relation in which the complainants here seek to place themselves in reference to Mr. Singleton.

And there are various cases in which, though the heir-at-law is not a necessary party, he is made such in practice, and the reason assigned is to free the estate from every blame that may lessen its value at the sale. (2 Ves. 431; 3 P. W. 91; 3 Br. Ch. Rep. 229, 365.)

And so in cases of indefinite or blended interests, all the participators are necessary parties; as where a residue is devised to several, or even devised by specified shares.

It is clear, then, that this cause must go back as well to have the necessary parties made as to have the decree reformed and reduced to legal precision."

In *State of California vs. Southern Pacific Co.*, 157 U. S. 229, the Supreme Court, in refusing to go on with a case in which the rights of the City of Oakland would have been involved, say:

"It was held in *Mallow vs. Hinde*, 25 U. S. 12 Wheat. 193 (6:599) that where an equity cause may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the circuit court if its process cannot

reach them or if they are citizens of another state; but if the rights of those not before the court are inseparably connected with the claim of the parties litigant so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the circuit court forms no ground for dispensing with such parties. And the court remarked: 'We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity whatever may be their structure as to jurisdiction. We put it upon the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court'."

The same doctrines are re-declared in *Minnesota vs. Northern Securities Co.*, 184 U. S. 199.

XIX.

The Court has full power *sua sponte*, to direct that the Denver and Rio Grande be made a party.

Equity Rule 37 provides: "Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause".

And that the Court will, *sua sponte*, always remedy a defect in parties is illustrated by *Minnesota vs. Northern Securities Co.*, 184 U. S. 199.

And the Court has full power to order a necessary party to appear and plead, where he is interested

in the subject-matter within the jurisdiction, even though he is a non-resident of the District.

Act of Mar. 3, 1875,—*Compton vs. Jessup*, 68 Fed. 263.

In conclusion we respectfully submit:

1. That the rule to show cause be made permanent and that the plaintiff be enjoined and restrained from further prosecuting the dependent action in New York.

2. That following the procedure in the Compton case, this Court should make and enter its order directing that the Denver & Rio Grande be made a party to this action, and be instructed to appear by Cross Bill, or Bill in Intervention, or by such other pleading as it may be advised.

3. That upon the appearance of the Denver & Rio Grande, and prior to any order of sale, this Court should adjudicate all matters bearing upon the relation between the two railroads.

JOHN S. PARTRIDGE,
Counsel for Receivers.

GARRET W. MCENERNEY,
Of Counsel.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

IN THE MATTER OF THE AP-
PEAL OF THE EQUITABLE
TRUST COMPANY FROM
THE ORDER ISSUING THE
INJUNCTION, DATED FEB-
RUARY 21, 1916.

**The Motion to Dismiss the Appeal for Failure
to Serve Citation has been Waived.**

COPY OF BRIEF FILED IN THE LOWER COURT
DEALING WITH THE MERITS OF THE CON-
TROVERSY PRESENTED ON APPEAL.

MURRAY, PRENTICE & HOWLAND,
JARED HOW,
W. E. S. GRISWOLD,

Attorneys for Equitable Trust Company
of New York.

F. W. M. CUTCHEON,
JOHN F. BOWIE,
Amici Curiae.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

IN THE MATTER OF THE AP-
PEAL OF THE EQUITABLE
TRUST COMPANY FROM
THE ORDER ISSUING THE
INJUNCTION, DATED FEB-
RUARY 21, 1916.

**THE MOTION OF THE RECEIVERS TO DISMISS THE
APPEAL FOR FAILURE TO SERVE CITATION
HAS BEEN WAIVED.**

On the hearing of the appeal in the above entitled cause, the Receivers appeared and moved to dismiss the appeal on two grounds:

(1) On the ground that the citation had not been issued and served upon them;

(2) On the ground that the order appealed from was not an appealable order.

Since these motions have been made the Receivers

have filed their brief dealing with the appeal on the merits, as well as a brief dealing with the motion to dismiss.

The action of the Receivers in moving to dismiss the appeal on the ground that the order was not an appealable order, constitutes a waiver of the motion to dismiss on the ground that citation was not issued and served. This was expressly decided in the case of *Andrews v. National Foundry*, 77 Fed., 774, in which case the Court of Appeals for the Seventh Circuit said:

"They waived citation by joining in the motion at our last term to dismiss the appeal because the decree below was not final."

At the hearing of the cause, Mr. McEnerney stated that he refrained from arguing the case on the merits because that would constitute a waiver of the motion to dismiss for failure to serve citation. Since the appeal has been argued, however, counsel have filed a brief upon the merits. This itself operates as a waiver of the motion to dismiss.

Richardson v. Green, 130 U. S., 104;

Renaud v. Abbott, 116 U. S., 227.

In *Richardson v. Green* the Court said:

"The issuing of a citation may be waived by the

appellee, and a general appearance by him is a waiver of a citation."

The brief filed is entitled "Brief on Appeal," and unquestionably constitutes a general appearance, dealing with the subject, as it does, upon the merits, and incorporating the brief on the merits filed in the lower Court.

It may be stated that counsel for the Receivers appeared in this Court pursuant to an order of the Judge of the lower Court, which order is in the following language:

"It appearing that The Equitable Trust Company of New York, plaintiff in the above entitled cause, has taken an appeal from an order enjoining said The Equitable Trust Company from further proceeding with a certain ancillary and dependent action in the Southern District of New York;

And it appearing that the Receivers heretofore appointed in this cause have not been made parties to said appeal;

It is ordered that the said Receivers be, and they are hereby authorized and directed to take any steps they may deem necessary to protect the jurisdiction of this Court upon the said appeal.

March 13th, 1916.

WM. C. VAN FLEET,
United States District Judge."

We file herewith copies of the brief of Mr. How, filed in the lower Court, dealing exclusively with the

interpretation of Contract B, and the merits of the appeal.

Respectfully submitted,

MURRAY, PRENTICE & HOWLAND,
JARED HOW,

W. E. S. GRISWOLD,

Attorneys for Equitable Trust Company of New York.

F. W. M. CUTCHEON,

JOHN F. BOWIE,

Amici Curiae.

2756

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

EQUITABLE TRUST COMPANY OF NEW YORK,
Plaintiff and Appellant,
vs.

WESTERN PACIFIC RAILWAY Co., et al.,
Defendants and Appellees.

BRIEF OF RECEIVERS ON MOTION TO DISMISS

GARRET W. McENERNEY,
JOHN S. PARTRIDGE,
Attorneys for Receivers.

Rincon Pub. Co., 689 Stevenson St., S. F.

Filed

MAR 20 1916

F. D. Monckton,
Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EQUITABLE TRUST COMPANY OF NEW YORK,
Plaintiff and Appellant,

vs.

WESTERN PACIFIC RAILWAY CO., et al.,
Defendants and Appellees.

BRIEF OF RECEIVERS ON MOTION TO DISMISS

I.

THE VERY QUESTION INVOLVED IN THE APPEAL IS WHETHER OR NOT THE NEW YORK SUIT IS AN INTERFERENCE WITH MATTERS PROPERLY IN THE HANDS OF THE RECEIVERS. THEY ARE, THEREFORE, CERTAINLY INTERESTED IN THE QUESTION AND ARE CERTAINLY NECESSARY PARTIES TO THE APPEAL.

In *Davis vs. Mercantile Trust Company*, 152 U. S. 590, it is said:

“One of the ordinary rules governing appeals is that all the parties to the record who appear to have any interest in the order or ruling filed must be given an opportunity to be heard on

such an appeal and that the failure to bring any such parties makes it necessary that the appeal be dismissed."

II.

IT IS THOROUGHLY WELL ESTABLISHED THAT THE RECEIVER IS TO BE CONSIDERED AS THE REPRESENTATIVE OF ALL PARTIES INTERESTED IN THE PROPERTY AND THAT AFTER HIS APPOINTMENT, NEITHER THE OWNER NOR ANY OTHER PERSON CAN LAWFULLY EXERCISE ANY AUTHORITY WHATSOEVER OVER THE PROPERTY.

Alderson on Receivers, Sec. 6, authorities cited;

Myer vs. Western Car Company, 102 U. S. 1.

In *Bosworth vs. Terminal Railroad*, 174 U. S. 182, it is said:

"A suit is brought to foreclose a mortgage, a receiver is appointed, and the mortgaged property taken possession of. A party intervenes, asserting that he has a claim against the mortgagor and the property, but conceding that it is subordinate to the claim of the plaintiff mortgagee. With that concession, the mortgagee stands perfectly indifferent to the question whether the claim be allowed or not. Still, it cannot be doubted that in such a case the receiver, holding the property against which a claim is made, can defend; and defend not only in the court appointing him, but also by appeal. In that defense he not only represents, it may be said, the mortgagor's interests, but also protects the property in his possession."

In *Thom vs. Pittard*, 62 Fed. 232, it is said:

"But first we have a motion to dismiss the appeal as improvidently awarded, made by the appellee; the reason assigned being that the receiver is in fact not a party to the suit, and therefore not entitled to an appeal. It is claimed that the receiver, the officers and servant of the court, subject to its orders, without personal interest in the funds under his control, which are to be accounted for as the court may direct, is not to be permitted to refuse to obey the court's orders by appealing from its decrees. But we must remember that the receiver represents all the parties in interest. He stands for the railroad company as well as for all persons having claims against it, and he speaks for the bondholders as well as for the stockholders. While he has no personal interest in the proceedings, except to faithfully and impartially discharge his duties, it is incumbent upon him to carefully protect the property confided to his keeping; to report to the court all matters connected therewith, relating to its safekeeping and proper disposition; to obtain permission to sue for debts due, and leave to pay claims owing by him. Permission given the receiver to sue, or direction to him to defend, should take with it the right to follow the suit to the court of last resort. It is a plausible argument that counsel for appellee submits, but it is, we think, without real merit. While it is true that any of the defendants to said chancery suit, interested in the property of the railroad company, and in its proper distribution, as also the plaintiffs, could have appealed from said decree in favor of appellee, proper steps therefor having been taken, still it does not follow that the receiver, who was in fact the defendant, so far as the issues raised by the petition were concerned, could not also appeal. In suits like the one in which this petition was filed,

after the appointment of a receiver, there is no one but him to defend the issues presented by such pleadings; and it is, at least, not best to have it understood that the court's directions to him to defend extend only to the court that hears the trial. But, so far as this proceeding is concerned, there is no difficulty, as the court below, whose officer the receiver was, gave him permission to prosecute still further the questions raised by the petition, when it approved his application for, and granted, this appeal. We consider the question settled in favor of the right of the receiver to appeal in cases like the one we now examine by the decision of the supreme court of the United States in *Farlow v. Kelley*, 108 U. S. 288, 2 Sup. Ct. 555, and 131 U. S., append. cci. It is insisted for the appellee that the right of the receiver, as an abstract question of law, to appeal, was not involved in that case. But it must be admitted that the supreme court held that in cases where an appeal had been granted the appellate court would entertain the same, and treat the order granting it as permission to appeal. While it is true, that under the provisions of section 692, Rev. St. U. S., it follows, of course, that an appeal will be granted if prayed for by one who has the right to it, still it is the duty of the trial court if the party asking for the appeal stands in such relation to the case that he can demand it. If he does not occupy such position the court can properly refuse the appeal. If the appeal is refused in a case where it properly lies, *mandamus* will issue. *Ex parte Jordan*, 94 U. S. 248."

In *McGregor vs. Third National Bank of Atlanta*, 53, Southeastern 94, Supreme Court of Georgia say:

"The receiver was, indeed an officer of court; but he was appointed for the express purpose of representing not only the defunct bank, but also

all of its creditors and stockholders. It was within the discretion of the court to permit its receiver to be sued. *Weslosky v. Quartermann*, 123 Ga. 312, 51 S. E. 426. When he was called on, by order of the court, to show cause why the prayers of the petition filed by the plaintiff bank should not be granted, he became a party defendant to the action, and it was his duty to defend it in behalf of all those of whom he was the duly appointed representative. Not only did he have a right to present his defense, but the very purpose of bringing him before the court as a party defendant was that he might urge any defensive matter to the suit which the creditors or other persons interested in the proper administration of the affairs of the defunct bank could urge, if themselves made parties defendant. Unless he represented them in the litigation, it would be necessary to bring all of them before the court; else any judgment rendered therein would not conclude or be binding upon them. It was through the receiver that these interested parties had to resist the granting of the relief sought by the plaintiff; and, the judgment being adverse to him, it was his right and duty, as their representative, to except thereto, if he or any of them was not satisfied therewith. Their right of review by the Supreme Court was certainly not cut off merely because he was an officer of court, and was, under ordinary circumstances, subject to its orders without question."

In *Southern Mutual Building & Loan Association vs. Andrews*, 26 Southern, 113, the Supreme Court of Alabama say:

"The plea avers, as we have seen, that the mortgage securing the debt owing by complainant is a part of the assets of the respondent in the hands of the receivers of its property, and that they alone have authority to collect any

amount due by complainant upon it. This being true, any decree involving an accounting by the court as to the amount due by complainant upon the mortgage debt would be *coram non judice* as to the receivers unless they were parties, and could not possibly accomplish the purpose for which the bill was filed. While it is true that in a court of law the legal title remained in the respondent, and was not divested of it by the decree appointing the receivers, yet it is nevertheless true that a decree adjudging the rights of complainant to redeem, as against the respondent solely, would not protect him against a foreclosure suit by the receivers, nor would the decree be *res adjudicata* of any issue which such suit would involve. Furthermore, so far as the mortgage is concerned in a court of equity the receivers are clothed with the equitable title to it, and possess sufficient fiduciary power to maintain a suit for its foreclosure. *Comer v. Bray*, 83 Ala. 217, 3 South. 554. The receivers having the equitable title to the mortgage and the sole authority to enforce it, the logical result is that they were necessary parties to the bill. *Southern Exp. Co. v. Western N. C. R. Co.*, 99 U. S. 191; *Beach*, Rec. Par. 716; *High*, Rec. Par. 258; *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539, 7 Atl. 647. The plea was good, and the decree overruling it will be reversed, and the cause remanded. Reversed and remanded."

III.

THE SO-CALLED ORDER FOR INJUNCTION WAS MERELY A WARNING ORDER, AND THEREFORE NOT APPEALABLE.

The Court, by its order appointing the receivers, had already enjoined all persons from in any way interfering with the receivers. The order appealed

from, therefore, was nothing more than a proceeding to bring into contempt.

Ex parte Tyler, 149 U. S. 164.

IV.

In the affidavit of Alvin W. Krech, President of the Plaintiff, filed on the order to show cause, and made a part of the petition for prohibition, it is admitted that Contract "B" is a part of the mortgage. The language is: "*Contract B was specifically and separately mentioned in and is subject to the terms and provisions of said First Mortgage.*"

Respectfully submitted,

GARRET W. MCENERNEY,
JOHN S. PARTRIDGE,
Attorneys for Receivers.

See 2755, 2756

No. 2757.

15

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

IN THE MATTER OF THE PETITION OF THE
EQUITABLE TRUST COMPANY OF NEW YORK,
AS TRUSTEE, FOR A WRIT OF MANDAMUS TO BE
ISSUED AND DIRECTED TO HONORABLE WILLIAM
C. VAN FLEET, JUDGE OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE NORTHERN
DISTRICT OF CALIFORNIA, AND TO SAID DIS-
TRICT COURT.

**BRIEF OF RESPONDENT ON PETITION
FOR MANDAMUS**

GARRET W. McENERNEY, and
JOHN S. PARTRIDGE,
Attorneys for Respondent.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, *Clerk.*

By....., Deputy Clerk.

Filed

MAR 20 1916

F. D. MONCKTON

No. 2757.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

IN THE MATTER OF THE PETITION OF THE
EQUITABLE TRUST COMPANY OF NEW YORK,
AS TRUSTEE, FOR A WRIT OF MANDAMUS TO BE
ISSUED AND DIRECTED TO HONORABLE WILLIAM
C. VAN FLEET, JUDGE OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE NORTHERN
DISTRICT OF CALIFORNIA, AND TO SAID DIS-
TRICT COURT.

**BRIEF OF RESPONDENT ON PETITION
FOR MANDAMUS.**

This is a petition for a mandamus directed to the Judge of the United States District Court for the Northern District of California, to compel him either to enter a decree in the form submitted, or to set for trial and hearing the cause in Equity pending in that court entitled "The Equitable Trust Company of New York, against Western Pacific Railway Company, et al." No. 169.

The answer of the respondent shows that the cause is not ripe for trial in several respects:

1. There is pending before that court an order directing the Receivers to report to that court all matters and things in connection with the Denver and Rio Grande Railroad Company and Missouri Pacific Railway Company and other corporations, for instructions as to what course the Receivers should have taken with regard thereto.

2. There is pending and undetermined the petition of the Receivers as to whether or not they should bring suit against the Denver and Rio Grande Railroad Company for the enforcement of the contract known as Contract B.

3. There is pending and undetermined before that court the petition of the Savings Union Bank and Trust Company for leave to intervene.

4. That Court has made an order directing that the Denver and Rio Grande and Missouri Pacific be made parties to the action. That portion of that order is now under assault in this Court on petition for Writ of Prohibition.

I.

IT IS ELEMENTARY THAT A WRIT OF MANDAMUS WILL NEVER ISSUE TO COMPEL A COURT TO ENTER A CERTAIN SPECIFIED DECREE.

If any authority is needed for a proposition so elementary, we might cite:

Ex Parte Flippen, 94 U. S. 350.

Ex Parte Burtis, 103 U. S. 238.

II.

IT IS EQUALLY ELEMENTARY THAT MANDAMUS WILL NOT ISSUE TO COMPEL A COURT TO SET A CAUSE OR HEAR IT UNLESS THE CAUSE IS RIPE FOR TRIAL AND A PLAIN CASE OF REFUSING TO PROCEED IS MADE OUT.

In the *Life & Fire Insurance Co. of New York vs. Adams*, 9 Peters, 573, the Supreme Court said:

“Though the Supreme Court will not order an inferior tribunal to render judgment for or against either party, it will, in a proper case, order such court to proceed to judgment. Should it be possible that in a case ripe for judgment, the court before whom it was depending, could, perseveringly, refuse to terminate the cause; this court, without indicating the character of the judgment, would be required by its duty to order the rendition of some judgment; but to justify this mandate, a plain case of refusing to proceed in the inferior court ought to be made out. In *ex parte Bradstreet* (8 Peters, 590) this court said:

“‘We have only to say that a judge must exercise his discretion in those intermediate proceedings which take place between the institution and trial of a suit; and if, in the performance of this duty, he acts oppressively, it is not to this court that application is to be made.’

“‘A mandamus or a rule to show cause is asked in the case in which a verdict has been given, for the purpose of ordering the judge to enter up judgment upon the verdict. The affidavit itself shows that judgment is suspending for the purpose of considering a motion which has been made for a new trial.

The verdict was given at the last term; and we understand it is not unusual in the State of New York for a judge to hold a motion for a new trial under advisement till the succeeding term. There is, then, nothing extraordinary in the fact that Judge Conklin should take time till the next term to decide on the motion for a new trial.'

"In the case now under consideration, no application is made for a mandamus directing the court generally to proceed to judgment. The petitioners require a mandamus ordering the judge to render a specific judgment in their favor. It is not even shown that the case is in a condition for a final judgment, nor is it shown that the judge is unwilling to render one. The contrary may rather be inferred from his readiness to grant a rule on the defendant, requiring him to show cause why judgment should not be rendered. In a case of such long standing, where it is more than possible the defendant might not be in court where judgment is asked on a confession made by the agent of the plaintiffs, professing to be the attorney of the defendant, the judge may be excused for requiring that notice should be given to the defendant."

On the 21st day of February, 1916, the lower court rendered its opinion to the effect that there could be no determination of the action without the presence of the Denver and Rio Grande Railroad Company and the Missouri Pacific Railway Company as parties.

Prior to the rendition of that judgment, no motion was ever made in said court to set the cause for trial, nor was any request or intimation of any kind or character whatsoever made to the said court that an immediate trial was desired.

The very first request for a trial was made *ex parte* on the 6th day of March, 1916, and at that time the court did not refuse to set the case for trial, but only continued the request for an early trial until this Court could dispose of the writ of prohibition.

The plain fact of the matter is that this is an attempt, by mandate, to set aside the order of the lower court directing the making of new parties herein.

We apprehend that the court will look beyond the mere form of a petition to its effect, and that would be to render nugatory an order of the lower court which it had full jurisdiction to make.

In this connection, we call your attention to the emphatic language of the Chief Justice in the matter of *Parsons*, 150 U. S., 149, where it is said:

“We cannot by writ of mandamus compel the court below to decide a matter before it in a particular way, nor can we, through the instrumentality of that writ, review its judicial action had in the exercise of legitimate jurisdiction.”

Ex parte Flippin, 94 U. S. 348 (24: 195);

Ex parte Burtis, 103 U. S. 238 (26: 392);

Morrison vs. U. S. Dist. Ct., 147 U. S. 14, 26 (37: 60, 65);

Re Hawkins, 147 U. S. 486, 490 (37: 251, 252);

American Constr. Co. v. Jacksonville, T. & K.

W. R. Co., 138 U. S. 372, 379, 386, (37: 486, 489, 492);

Re Humes, 149 U. S. 192 (37: 698).

Under such circumstances, it is respectfully submitted that the discretion of the lower court should not be controlled by the extraordinary Writ of Mandamus.

GARRET W. McENERNEY, and
JOHN S. PARTRIDGE,
Attorneys for Respondent.

